

***United States Court of Appeals
for the Second Circuit***



APPENDIX

B

74-2066

In The
United States Court of Appeals
For The Second Circuit

*

Docket No. 74-2066

UNITED STATES OF AMERICA,

Appellee,

- against -

CHARLES MESSINA,

Appellant.

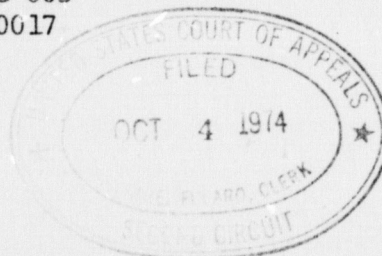
On appeal from the United States District Court
for the Eastern District of New York

APPENDIX OF APPELLANT

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NOTE: The underlining and other markings on the pages of the original transcript reproduced herein appear on the only copy of the transcript which was available to defendant at the time this Appendix was prepared and are not intended to serve as emphasis.

ATTORNEYS

For U.S.A. Levin-Epstein

U.S.

CHARLES MESSINA

For Defendant:

Legal and

t of goods from an interstate shipment

[illegible]

PROCEEDINGS

4	Before BARTELS, J. - Indictment filed
	By Weinstein J - Order filed that case shall be pretried on
	April 8, 1974 at 9:30 am.
4	Before WEINSTEIN, J. - Case called- Pleading adjd to 4-9-74 at 9:30 A.M.
	Before WEINSTEIN, J. - Case called- Deft and counsel present-Deft arraigned
	and enters a plea of not guilty -Pre-trial conference held and concluded
	Bail cont'd -Trial set for 4/22/74
	Govts Notice of Readiness for trial filed.
4	Before WEINSTEIN J -case called - deft & counsel M.Seltzer of
	Legal Aid present - defts motion to suppress - hearing ordered and
	begun - Hearing concluded - motion denied - Jurors selected and
	sworn - Trial ordered & BEGUN - Trial contd to 4-23-74.

DATE	PROCEEDINGS
3-74	Before WEINSTEIN, J.- Case called- Deft and counsel present- Trial resumed
	Trial contd to 4-24-74 at 10:30 A.M.
-24-74	Before WEINSTEIN J - case called - Deft & counsel present - trial
	resumed - Govt rests - Deft rests - Miranda Hearing ordered and Begun.
	Hearing concluded - court finds the statement of deft admissable.
	Trial contd to April 25, 1974 at 10:30 am
25-74	Before WEINSTEIN J - case called - deft & counsel present - Trial
	resumed - court charges Jury - alternates discharged - marshals sworn -
	Jury retires for deliberation - Jury sent home at 6:30 PM-trial contd
	to 4-26-74 .
26-74	Before WEINSTEIN J - case called - deft & counsel present - trial
	resumed - Jury resumes deliberations - Order of sustenance signed for
	lunch - jury returns at 5:30 PM and renders a verdict of guilty on
	each of counts 1 and 2 - defts motion to set aside the verdict is
	denied - jury polled & discharged - trial concluded - Bail contd.
26-74	By Weinstein J - Order of sustenance filed.
26-74	3 stenographers transcripts filed (pgs 135 to 695)
9-74	Stenographers transcript filed dated 4-26-74.
-30-74	Voucher for expert services filed
17-74	Voucher for Expert Services filed (Messina) trial (Ordway Hilton, Examine
	of Questioned Documents)
6-14-74	Voucher for Expert Services received from Chambers and forwarded to
	Court of Appeals for approval (above voucher ret'd from Admin. Office
	as in excess etc) See Footnote of letter of June 12, 1974 from
	Admin. Office and notation by Judge Weinstein directing that the
	copy of voucher with recommendation of Judge Weinstein be forwarded
	to C of A and also to counsel for the deft & Ordway Hilton, etc.
	Copied mailed as directed by Judge Weinstein. Legal Aid
8-74	Before WEINSTEIN, J.- Case called- Deft and counsel present- Sentence a
	to 7-8-74 at 10:00 A.M.- Deft to be assigned new attorney Counsel to be
	relieved when new counsel is appointed
-74	Memo from A.U.S.A. Levin-Epstein to Chambers and court exhibit's 1 filed
-74	Before WEINSTEIN J - case called & sentence adjd to July 30, 1974.,
	at 9:30 am.
2-74	Before WEINSTEIN J - case called - deft & counsel present - deft
	sentenced to imprisonment for 4 years pursuant to 18:4208(a)(2), on each
	of counts 1 and 2 to run concurrently.
	Execution stayed pending appeal.
-2-74	Judgment & Commitment filed - certified copy to be filed

PROCEEDINGS

74 Notice of appeal filed
 74 Docket entries and duplicate of notice of appeal mailed to court of
 appeals
 74 Order received from the C of A filed that the Index to the
 Record be docketed on or before Sept. 3, 1974.
 74 Stenographers transcript filed dated 4-22-74.
~~74 Stenographers transcript filed dated 4-26-74.~~
 74 Record on Appeal certified and mailed to the Court of Appeals.

A TRUE COPY	
DATE	5/1/74 1974
LEWIS ORCEL	
BY	CLERK
DEPUTY CLERK	

INDICTMENT

TPP:EL-E:lm
F. 735155

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
MAR 28 1974

----- X

UNITED STATES OF AMERICA

-against-

CHARLES MESSINA,

Defendant.

Cr. No. _____
(T. 18 U.S.C. §659)

INDICTMENT

----- X

THE GRAND JURY CHARGES:

74CR 229

COUNT ONE

On or about the 25th day of November 1973, within the Eastern District of New York, the defendant CHARLES MESSINA, wilfully and knowingly, with intent to convert to his own use did steal, take and carry away from Lance Air Freight, Cargo Building 80, John F. Kennedy International Airport, approximately forty-four (44) cartons of Italian turtleneck pullover shirts, having a value of approximately Forty-five Thousand Dollars (\$45,000), which goods were moving as, were part of and constituted a foreign shipment of freight from Milan, Italy to New York City, State of New York. (Title 18 United States Code, §659).

COUNT TWO

On or about the 25th day of November 1973, within the Eastern District of New York, the defendant CHARLES MESSINA did wilfully and unlawfully receive and have in his possession approximately forty-four (44) cartons of Italian turtleneck pullover shirts, having a value of approximately Forty-five Thousand Dollars (\$45,000), which goods had been stolen from Lance Air Freight, Cargo Building 80, John F. Kennedy International Airport, while moving as a part of and constituting a foreign shipment of freight from Milan, Italy to New York City, State of New York, the defendant CHARLES MESSINA knowing the same to have been stolen. (Title 18 United States Code, §659).

Ethan Levin
FOREMAN.

Ethan Levin
UNITED STATES ATTORNEY

5a
INDICTMENT

No. _____

UNITED STATES

EASTERN

THE UNITED

CHARLES ME

IND

T. 18 U.

A true bill,

Filed in _____
of _____

Bail, \$ _____

ETHAN LEVIN
Assistant

U.S. DISTRICT COURT

District of NEW YORK

Division

STATES OF AMERICA

vs.

SSINA,

Defendant.

INDICTMENT

S.C. \$659

Foreman.

Court this day

, A. D. 19

Clerk.

IN-EPSTEIN GPO 902-482

U.S. Attorney

The Court, having been satisfied
that a majority of The Grand
Jury of March, 1974 have con-
curred in this True Bill, orders
The Indictment filed.

3/28/74

Thorne H. Harris
DEPUTY CLERK

1 The witness was shown one picture of
2 Mr. Messina prior to his representation.

3 THE COURT: Who identified him in the lineup?

4 MR. LEVIN-EPSTEIN: Three witnesses.

5 THE COURT: Have them up here.

6 MR. LEVIN-EPSTEIN: May I call them up from
7 my office?

8 THE COURT: Yes.

9 MR. LEVIN-EPSTEIN: The witnesses are in my
10 office. They're being brought up now.

11 THE COURT: We'll take a five-minute recess.

12 (Recess)

13 THE COURT: Call your first witness, please.

14
15 R O B E R T S C H M E L T Z, having been duly sworn
16 by the Clerk of the Court, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. LEVIN-EPSTEIN:

19 Q Would you state your full name for the record.

20 A Robert Schmeltz.

21 Q Are you employed?

22 A Yes.

23 Q What is your occupation?

24 A A driver.

25 Q By "driver," what exactly do you mean?

Schmeltz-direct

6

A I drive a tow truck.

Q Mr. Schmeltz, I direct your attention to February 27th of 1974, this year. I ask you on that occasion did you have the opportunity to view an FBI lineup?

A Yes, sir.

Q Were you viewing that lineup in the capacity of a witness?

A I was trying to pick somebody out.

Q Just answer the question as you're most comfortable.

I show you Government's Exhibit 1 for identification and ask you if you recognize it (handing to the witness).

A Yes.

Q Can you describe to the Court and for the record what it is.

A A lineup that he had us look, you know, look at.

Q Is this photograph a fair and accurate representation of the lineup that you viewed?

A Yes.

Q Is your answer "yes"?

A Yes.

MR. LEVIN-EPSTEIN: Can this be offered in

Schmeltz-direct

7

evidence?

THE COURT: Deemed into evidence.

Q During the course of this lineup, did you have occasion to select one of the people in the lineup?

A Yes.

Q Can you indicate for the record and the Court which of these people you indicated?

A (Indicating)

MR. LEVIN-EPSTEIN: Let the record show, your Honor, the witness is pointing to the defendant, Charles Messina, depicted in the photograph, Government's Exhibit 1, and bearing the sign No. 3.

Q Can you describe -- withdrawn.

Prior to February 27, 1974, Mr. Schmeltz, the day that you testified this lineup occurred, had you ever seen Charles Messina before?

THE COURT: Keep your voice up. Sit at the table in the corner and talk loud, so everybody can hear you.

(Witness complies, changes seat as directed.)

A Just at the towing place.

Q Can you describe for the record, Mr. Schmeltz, what you mean by "the towing place"?

A Bob's Towing Service.

Schmeltz-direct

8

Q Had there been a time that you were employed
at Bob's Towing Service?

A Yes.

Q Had you ever seen Mr. Messina other than that
time?

A No.

Q When you picked Mr. Messina out of the lineup,
did he look exactly the same as the day you saw him at Bob's
Towing?

A No, his clothes were different, you know.
That's it. Otherwise, he looked the same.

MR. LEVIN-EPSTEIN: I have no further
questions, your Honor.

CROSS EXAMINATION

BY MS. SELTZER:

Q Mr. Schmeltz, what was the date that you
originally saw whoever this person was at the towing service?

A It was on Sunday. I don't know the exact day.

Q Do you remember the month?

A Excuse me?

Q Do you remember the month?

A Not now.

Q Under what circumstances did you see the
person whom you identified as Mr. Messina at the towing

Schmeltz-cross

9

1
2 service?

3 A He came to have a tow job done on the truck.

4 MR. LEVIN-EPSTEIN: Your Honor, I question
5 the relevancy as it goes to the suggestive nature
6 or possible suggestive nature of a lineup.

7 THE COURT: I take it this is what he's going
8 to testify to?

9 MR. LEVIN-EPSTEIN: At trial.

10 THE COURT: Let her find out. It's no surprise.
11 Go ahead.

12 Q Would you describe what happened at the towing
13 service that you came into contact with Mr. Messina, this
14 person?

15 A He was going to pay for the job. He needed a bill,
16 so I had made out the bill for him and signed it.

17 Q Could you be a little more specific? What
18 was the first thing that happened? Did he come alone, come
19 with somebody else?

20 A He came alone as far as I can see, upstairs in an
21 office.

22 Q You were upstairs in the office?

23 A Yes.

24 Q What happened then?

25 A He came in, started talking to the dispatcher about

EXCERPT FROM TESTIMONY OF ROBERT SCHMELTZ-CROSS EXAMINATION
RE: IDENTIFICATION

11.

Schmeltz-cross

10

1 having the job done.

2 Q Where were you at that time?

3 A Sitting next to the dispatcher, like watching
4 TV.

5 Q Do you recall, when the person came, what he
6 was wearing?

7 A Yes.

8 Q What was he wearing?

9 A Like a red checkered coat and a hat.

10 Q A hat? What kind of a hat?

11 A Dark hat.

12 Q Was it -- Could you describe it? Was it a
13 cap or felt beret or what kind of a hat was it?

14 A One of those Russian hats, something like that.

15 Q One of the black ones?

16 A Yes.

17 Q With fur --

18 MR. LEVIN-EPSTEIN: Your Honor, if Miss
19 Seltzer would let the witness testify as to his own
20 recollection, it would be more helpful.

21 Q Would you describe the hat a little more
22 specifically?

23 A Russian hat, like with the curly fur on it.
24 I guess you can say that.
25

EXCERPT FROM TESTIMONY OF ROBERT SCHMELTZ-CROSS EXAMINATION
RE: IDENTIFICATION

12

1

Schmeltz-cross

11

2

Q Do you recall what color it was?

3

A Dark color.

4

Q Was this in the wintertime?

5

A Yes, still winter.

6

Q You don't recall what month it was?

7

A No.

8

Q What did this person say, if you recall, to

9

the dispatcher? Did you have a conversation with him?

10

A Talking about getting a truck towed. I wasn't

11

paying too much attention to that, you know.

12

Q What were you doing?

13

MR. LEVIN-EPSTEIN: Objection as to the

14

relevancy as to a lineup.

15

That's the issue.

16

THE COURT: It bears on his ability to observe

17

sufficiently to identify. I'll permit it.

18

Q What were you doing at that time?

19

A I was going to get off in a little while,

20

just coming off my shift. I'm sitting, watching TV.

21

Q Do you recall how long -- Were you watching

22

TV or watching the dispatcher at that time?

23

MR. LEVIN-EPSTEIN: Objection as to form.

24

THE COURT: I'll allow it.

25

A I was watching TV at the time, you know,

Schmeltz-cross

12

while the dispatcher and him were talking.

Q Do you recall what period of time the dispatcher
er and this gentleman were talking, a minute or fifteen
minutes?

A About five minutes, I guess.

Q Then what happened?

A Then he wanted a bill, so the dispatcher
asked me to make up a bill.

Q Who wanted the bill?

A The man who came in for the tow.

Q Did he want you to make a bill?

A The dispatcher wanted me to make up a bill.

Q When you made the bill, did he ask you
questions?

A He handed me the papers on it.

Q Did you have a direct discussion with this
person?

A Just as far as telling me what the name was
and all that.

Q Did he ever take off his coat or his hat?

A No.

Q What happened after you made up the bill?
Did he have to sign it?

A Yes.

Schmeltz-cross

13

1

2

Q He signed it in your presence?

3

A Yes.

4

Q Did he sign his whole name?

5

A I didn't really look at what he signed, just

6

that he signed it.

7

Q You didn't look at what he signed at the time?

8

A I just looked to see if there was a signature

9

there. I didn't look at the name or anything.

10

Q Was it the whole signature there?

11

A I didn't notice.

12

Q Then what happened?

13

A Then he gave me a \$100 bill and I gave him

14

change.

15

Q How much change?

16

A Sixty-five.

17

Q Then what did you do?

18

A Then I gave him a copy of the bill and

19

started watching the TV again.

20

Q That was the sole contact that you had with

21

this person who came into the office?

22

A Right.

23

Q Did there come a time when any agents from

24

the FBI or any other federal agency came and showed you

25

any pictures?

EXCERPT FROM TESTIMONY OF ROBERT SCHMELTZ-CROSS EXAMINATION
RE: IDENTIFICATION

15a

Schmeltz-cross

14

A Excuse me, I didn't get that.

Q I say did there come a time when any FBI agent or any other agents or a U.S. attorney or anybody else showed you any pictures?

A They came and showed me pictures.

Q When was that?

A A couple of days later.

Q Could you explain the circumstances surrounding that incident?

A They just came and said, "What happened?"

Q Who came?

A The FBI agents?

Q How many?

A Two.

Q What did they say to you?

A They told us about what happened with the truck.

Q What did they tell you?

A That is was, you know, hijacked.

Q How many days later -- I'm sorry --

A Two, three days.

Q Could you try as well as you can to specifically tell us what those agents told you?

A Just that we have to go down and look at some

Schmeltz-cross

15

shots, try to pick out who we thought was in it.

Q Did they tell you that they had a suspect?

A They didn't say anything to me like that.

Q Did they tell you anything about who they
thought the person was?

A No.

Q Did they ask you for a description of the
person?

A Yes.

Q What did you tell them at that time?

A What he was wearing.

Q Tell us now what you recall telling the agents.

A Red checkered jacket, like the hat --

Q Excuse me. The agents aren't here.

MR. LEVIN-EPSTEIN: The case agent on the
case is here, Mr. Francis R. Jules, but I believe
there's ample authority for that proposition that
the assisting agent on a matter may sit at counsel
table with the prosecutor.

THE COURT: Is he going to testify?

MR. LEVIN-EPSTEIN: That's undecided at this
time. However, in any event, the testimony that
Mr. Jules will give will be background information
and not factual in the sense that other witnesses

Schmeltz-cross

16

might be suggested of testimony by his testimony
or the presence in the courtroom, at least in my
opinion might influence or color other testimony.

THE COURT: Was Mr. Jules present at the
showing?

MR. LEVIN-EPSTEIN: Of what?

THE COURT: These pictures.

MR. LEVIN-EPSTEIN: No.

THE COURT: He may remain.

Q Did you ever meet Mr. Jules prior to today?

A Yes.

Q On what occasion?

A Looking at shots a couple of other times.

Q He was present that day when you went to look
at the photographs?

A Yes, he was there.

Q Did he say anything to you at the time that
you went to look at the photographs?

A Just that I would have to look through the
photographs, pick out the ones that I thought was it.

Q Were there any other agents besides Mr. Jules
there?

A Yes.

Q Who was there? Do you remember?

Schmeltz-cross

17

A I don't know them by name.

Q Do you recall how many were there?

A The two regular guys that I was with were
there.

Q What do you mean by that?

A The two that worked there.

Q The three of you went down together. Who
were the other people who went down with you from Bob's
Towing?

MR. LEVIN-EPSTEIN: If I might interrupt,
Ms. Seltzer, are you identifying the photo identifi-
cation or lineup?

MS. SELTZER: About the photo identification.

Q Right.

A (No response.)

Q When you went down to look the first time at
photographs, did you go alone or did you go with anyone
else?

A From where I worked?

Q Yes.

A I went.

Q Who did you go with?

A Kenny.

Q Do you know his last name?

Schmeltz-cross

18

A No.

Q What does he do at Bob's Towing?

A He was a driver, also.

Q Would you describe what happened when you went to view these photographs?

A They had them sitting in a room.

Q Who was sitting in a room?

A Kenny and I, sitting in a room. They took us out one at a time to look at different books.

Q Could you describe what happened as you looked through these books?

A I picked out anybody, you know, looked something like the one I was looking for.

Q How many pictures would you say you picked out?

A Out of about four, five.

Q At that time what did you say to the agents when you picked out these pictures?

A That that was like what the guy looked like.

Q Did you recognize anyone as being positively that person?

A Not then.

Q But any one could have been?

A Excuse me?

Q You thought any one of these four or five

Schmeltz-cross

19

people could have been that person?

A A It had the characteristics of the guy.

Q What characteristics were those?

A The type of face, you know, stuff like that.

MS. SELTZER: I would ask if the Government
has those pictures.

MR. LEVIN-EPSTEIN: The Government is prepared
to produce in court a spread of photographs, the
eight photographs, from which Mr. Schmeltz and the
other witnesses selected a photograph of Mr. Charles
Messina.

It follows the photographs that Mr. Schmeltz
is testifying to as of now, he's referring to the
very large set of books that's maintained by the
various law enforcement agencies. This is not the
photographic spread that I believe -- Withdrawn.

THE COURT: Do you have the pictures?

MR. LEVIN-EPSTEIN: Of the eight?

THE COURT: Those he identified from the big
books.

MR. LEVIN-EPSTEIN: The Government is not
prepared at this time to produce the voluminous
photographs that Mr. Schmeltz originally looked at.

MS. SELTZER: I want four.

Schmeltz-cross

20

THE COURT: Did you mark those when he picked them?

MR. JULES: No, your Honor. Actually, what happened, if I may say, Detective McKenna and Maiola, they were the individuals who showed the witnesses a spread of eight photos, which these witnesses picked out the picture of Charles Messina.

THE COURT: What about looking through books? Are you aware of that?

MR. JULES: I have to refresh my memory.

Did you go to the New York office of the FBI?

THE WITNESS: Yes, but that's not where I looked at the other books.

MR. JULES: Where did you look at the other books?

THE WITNESS: Port Authority.

MR. JULES: These are albums that they have at the Port Authority. I was not present at that time.

MS. SELTZER: I would request that the Government be directed to produce those pictures.

THE COURT: Well, do we have a Port Authority personnel here?

MR. LEVIN-EPSTEIN: We'll have them here.

Schmeltz-cross

21

THE COURT: Go down to check.

MR. JULES: Yes, your Honor.

Q After you picked out these four or five pictures, what happened?

A They brought us back to the room together. We sat there a few minutes.

Q When you were picking out those pictures, were you seated by yourself in a room, or seated with Kenny?

A By myself.

Q When you finished picking out those pictures, were you still by yourself?

A Yes.

Q And then where did you go?

A They brought us back together again, Kenny.

Q They brought you back to where Kenny was?

A Yes.

Q What happened after that?

A Kenney picked out. Then he came back and we went into a room, you know, to try to draw the guides.

Q Was there, in fact, a composite picture drawn at that time?

A (No response.)

Q In other words, did they have an artist there?

EXCERPT FROM TESTIMONY OF ROBERT SCHMELTZ-CROSS EXAMINATION
RE: IDENTIFICATION

23

1 Schmeltz-cross

22

2 A Yes.

3 Q Was he trying to draw a sketch of that person
4 from the description that you gave?

5 A Yes.

6 Q Did he in fact draw such a picture?

7 A I believe so, yes.

8 MS. SELTZER: Your Honor, I would request
9 that that picture be produced.

10 THE COURT: Do you have it?

11 MR. LEVIN-EPSTEIN: No, we hadn't intended to
12 offer that.

13 THE COURT: You don't have it?

14 MR. LEVIN-EPSTEIN: Right.

15 THE COURT: Proceed.

16 MS. SELTZER: I would request the Government
17 be directed to produce it at some time before the
18 trial.

19 THE COURT: They'll try to get it for you.

20 The Port Authority composite, we'll have a Port
21 Authority individual here.

22 MS. SELTZER: Thank you.

23 Q Did the two of you together give a description
24 for this composite picture?

25 A Not together. We were separate.

ONLY COPY AVAILABLE

1 Schmeltz-cross 23

2 Q After that composite picture was drawn, was
3 anything said about it? Did you say it looked like the
4 person?

5 A (No response.)

6 Q Can you say anything about the quality of
7 this picture? Or what did you think about the picture?

8 A They didn't draw one for me because I couldn't
9 get it down off the little cards and stuff. The other one,
10 Kenney drew, looks something like it.

11 Q Did you see the picture from Kenny's state-
12 ments?

13 A Another day.

14 Q Did you think the picture looked like the
15 person you had seen in Bob's Towing?

16 A No, it wasn't too close to it, no.

17 Q But you just said it looked a little bit like
18 it?

19 A Very little.

20 Q After this composite picture was drawn, did
21 anything further happen at the Port Authority?

22 A No.

23 Q Did you go home?

24 A Yes.

25 Q Did anybody say anything to you about

Schmeltz-cross

24

further identification or further testifying?

A They said they would let us know if they wanted us.

Q When was it in fact that you were again contacted?

A A couple of days later they came by the shop.

Q What happened several days later?

A They had some more pictures.

Q Who is "they"?

A The agents.

Q Was Mr. Jules one of the agents?

A Yes.

Q Do you recall any of the other agents?

A There was a heavy guy. There was a heavy guy and the guy with the black hair. I don't know him by name.

Q There were three?

A No, two. He wasn't there.

Q "He"?

A (Indicating).

THE COURT: Indicating Mr. Jules.

Q What happened? They came to Bob's Towing?

A Yes.

Q What happened when they came to Bob's Towing?

A They had some more pictures to look at.

Schmeltz-cross

25

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Q How many pictures?

3

A I don't remember, a couple -- not many, just

4

a couple.

5

Q Would you say less than ten?

6

A Less than ten.

7

Q What did they do with these pictures?

8

A They had us look at them.

9

Q Did they spread them out in front of you?

10

A They handed to me. I looked through them.

11

Q Did they tell you anything at the time they

12

handed them to you?

13

A Just to "look through these" and see if I see

14

anybody.

15

Q Did you, in fact, pick out any pictures?

16

A Yes.

17

Q How many did you pick out?

18

A (Indicating).

19

Q One. Is that the picture that you identified

20

as being the person whom you believed was the person whom

21

you had seen at the Towing Service?

22

A Yes.

23

Q Did you make any statements at that time?

24

What did you tell the agents when you were picking out --

25

Did you say you thought it was the guy, might have been the

Schmeltz-cross

26

guy, or one hundred percent sure?

A That looked like the guy.

Q You said it looked like him. Is that what
you said?

A Yes.

Q Did you say it was the person or did you say
it looked like the person?

A I don't remember how it was worded.

MR. LEVIN-EPSTEIN: Might I interrupt for a
moment? I apologize. I was remiss in that
I should have handed this to Miss Seltzer prior to
her cross-examination. This is -- May this be
marked as Government's Exhibit 3500-1.'

MS. SELTZER: I would request --

THE COURT: Government's Exhibit 2 for iden-
tification. It would be so much better if you gave
her those things the morning of the trial so we
don't have unnecessary reversals as we've had in
this court for just this kind of mistake.

MR. LEVIN-EPSTEIN: You're obviously correct.
I apologize. It will not happen again.

THE COURT: All right, go ahead.

MS. SELZER: I would now request the Government
to produce the photo spread.

Schmeltz-cross

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THE COURT: Do you have the photo spread?

MR. LEVIN-EPSTEIN: Yes, we do.

THE COURT: Produce it.

MR. LEVIN-EPSTEIN: While Mr. Jules is obtaining the requested exhibit, perhaps we can go through the 3500 material.

THE COURT: You don't need me here. You can give it to counsel and have it marked for identification. Call me when you're ready to proceed.

MR. LEVIN-EPSTEIN: Let the record indicate I'm handing to the Clerk an FBI investigation report reflecting an interview with Robert Schmeltz. Let that be marked as Government's Exhibit 3.

THE CLERK: Government's Exhibit 3 for identification.

(So marked)

MR. LEVIN-EPSTEIN: Let the record indicate I'm handing three FBI investigation reports related to the potential testimony of Robert Bavaro. That should be marked as Government's Exhibits 4, 5 and 6 for identification.

THE CLERK: So marked, as 4, 5, and 6 for identification.

(So marked)

EXCERPT FROM TESTIMONY OF ROBERT SCHMELTZ-CROSS EXAMINATION
RE: IDENTIFICATION

29a

Schmeltz-cross

23

MR. LEVIN-EPSTEIN: Let the record show I'm
handing now to the Clerk an FBI investigation report
relating to the testimony of Robert Schmeltz. Let
it be marked Government's Exhibit 7 for identification.

THE CLERK: So marked, as Government's Exhibit
7 for identification.

(So marked)

MR. LEVIN-EPSTEIN: FBI investigation report
relating to the testimony of Henry or Hank Wilkens.

THE CLERK: 8 for identification.

(So marked)

MR. LEVIN-EPSTEIN: And another report of
Mr. Wilkens.

THE CLERK: So marked as 9 for identification.

(So marked)

MR. LEVIN-EPSTEIN: Let the record show
another FBI investigation report relating to the
possible testimony of Robert Bavaro, Government's
Exhibit 10 for identification.

THE CLERK: So marked.

(So marked)

MR. LEVIN-EPSTEIN: Let the record indicate
that I'm handing to the Clerk for marking three
FBI investigation reports relating to the testimony

Schmeltz-cross

29

of Kenneth Mantione.

THE CLERK: So marked as Government's Exhibit
11, 12, and 13 for identification.

(So marked)

MR. LEVIN-EPSTEIN: And a fourth statement.

THE CLERK: So marked as Government's Exhibit
14 for identification.

(So marked)

MR. LEVIN-EPSTEIN: Let the record indicate
that I'm handing to the Clerk an FBI investigation
report reflecting or relating to the testimony or
potential testimony of Dominick Maiola.

THE CLERK: Exhibit 15 for identification.

(So marked)

MR. LEVIN-EPSTEIN: Finally, let the record
show I'm handing copies of the grand jury testimony
of Special Agent Francis R. Jules, Federal Bureau
of Investigation, to be marked for identification
as well.

THE CLERK: Government's Exhibit 16 for
identification.

(So marked)

MR. LEVIN-EPSTEIN: Let the record indicate
I'm handing to the Clerk seven photographs to be

Schmeltz-Cross

10

marked as Government's Exhibit 17, entirely contained
in an envelope.

THE CLERK: Government's Exhibit 17 for
identification, photographs.

(So marked)

THE CLERK: All exhibits were handed back to
the Government counsel.

(Recess)

MR. LEVIN-EPSTEIN: Your Honor, I've shown the
evidence that the Government intends to produce at
the time of trial to defense counsel. Some has been
marked; some has not yet been marked. As the Court
wishes, it can be marked prior to proceeding further,
or we can mark it as it comes in.

THE COURT: Very well.

MR. LEVIN-EPSTEIN: Whichever you prefer.

THE COURT: I don't care. Proceed.

MR. LEVIN-EPSTEIN: Your Honor, during the
recess the Government offered for identification,
and it was so marked, Government's Exhibit 17,
the seven photographs. It's been marked, your
Honor.

MS. SELTZER: Your Honor, it came to my
attention during the recess, one of the spectators,

Schmeltz-cross

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who apparently was observing the conversation between
Mr. Levin-Epstein and the witness, that certain state-
ments were made by Mr. Levin-Epstein to the witness.

I would just like to ask him if certain things
were said.

THE COURT: Who? The witness?

You have the witness sworn.

MS. SELTZER: This is aside. This is not
directly on what I was inquiring.

BY MS. SELTZER:

Q Did Mr. Levin-Epstein come up and tell you
you're not convincing enough and did you tell him you can't
remember?

MR. LEVIN-EPSTEIN: Objection. If Ms.Seltzer
has someone who overheard it, let's put that person
on the stand.

A No.

Q Are you certain that didn't happen?

A Yes.

MS. SELTZER: I have a witness who says
it did.

THE COURT: Put on your witness.

Proceed with the hearing.

Mr. Messina, do you find this hearing amusing?

Schmeltz-cross

32

THE DEFENDANT: No, sir.

THE COURT: I notice you're chewing gum and
smirking at the witness.

THE DEFENDANT: I'm not smirking at the
witness; I'm looking at Mr. Epstein and his actions.

THE COURT: I see.

I notice there are three persons in the
courtroom. What is your name, madam?

MRS. MESSINA: Mrs. Messina.

THE COURT: You ought to control yourself
and not express views by your facial expressions
when the witness testifies.

MRS. MESSINA: I'm sorry.

MS. SELTZER: It was Mrs. Messina who made
this statement.

MR. LEVIN-EPSTEIN: I might ask your Honor as
well if Ms. Seltzer has her witnesses in the court-
room who she feels will be testifying.

THE COURT: All witnesses to be testifying
should be excluded from the courtroom.

MS. SELTZER: Can we keep Mr. Messina here?

BY MS. SELTZER:

Q What were the primary characteristics, if
you recall, that you identified the pictures and subsequently

1 the lineup from?

2 A The age, like on the face and stuff. Certain
3 features that caught my eye.

4 Q For instance, it's the color of the hair and
5 what?

6 A The facial expression, you know, the way the eyes
7 were, you know.

8 Q What else?

9 A Just the age, the face.

10 Q For how many minutes would you say it was
11 in the towing service that you actually had an opportunity
12 to view the person that had come in?

13 A Only viewed him for a few minutes.

14 Q At that time you were watching television;
15 is that right?

16 A Right.

17 Q At that time you were also filling out the
18 towing form; is that correct?

19 A Yes.

20 Q In that period of several minutes you were
21 doing other things also, right?

22 A Yes.

23 Q Therefore, how much time would you say you
24 actually had had an opportunity to get a full view of this
25

Schmeltz-cross

34

person?

MR. LEVIN-EPSTEIN: He's answered the
question, your Honor.

THE COURT: I'll allow it.

A A minute, two minutes.

Q Were you sitting or standing at that time?

A Sitting.

Q What was the other person doing?

A Excuse me?

Q What was the person who came into the office
doing? Was he sitting or standing?

A Standing.

Q Did he ever sit down?

A No.

Q Did he ever take off his coat?

A No.

Q Was the coat he was wearing a winter coat?
It was wintertime?

A Yes, I guess he wore a coat. I didn't really
look at the coat.

Q You remember it was red and white checked?

A Yes.

THE COURT: Did he use the word "white"?

Did you use the word "white"?

THE WITNESS: Red and black.

Q When you walked into FBI headquarters the morning of the lineup, do you recall that there was anyone in the lobby who looked familiar to you?

A No.

Q Do you remember seeing anyone in the lobby?

A Just the guy who came with, and then the agent when he came down to pick us up.

Q Who was the person, the other person?

A The other guy I work with.

Q There was nobody standing down there that you noticed?

A Excuse me?

Q There was nobody down there that you noticed?

A No.

MR. LEVIN-EPSTEIN: Objection. The witness has testified in response to Miss Seltzer's questions there was nobody standing down that he recognized, not that he noticed.

Q Was there anybody you noticed --

MS. SELTZER: I'm sorry, your Honor.

THE COURT: Go ahead.

Q Was there anyone downstairs you noticed?

A I wasn't really looking at anybody.

Schmeltz-cross

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Q Were there any people standing around?

A A couple of people.

Q Did you look at those people?

A No, I was talking to Mr. Bavaro.

Q How many people were down there?

A I really didn't count, walking in and out.

Q Was there a man standing with a woman down there that you recall?

A I don't recall.

Q Do you recall seeing the person whom you later identified being in the lobby when you went through the FBI building?

A I didn't see him; I wasn't looking. I was talking to Mr. Bavaro most of the time, the agents.

Q Are you absolutely sure that the person that you picked out was the person whom you saw in the towing service, or do you just think he looked more like him than any of the other people in the lineup?

MR. LEVIN-EPSTEIN: Objection as to form.

THE COURT: I'll allow it.

A What was it?

MS. SELTZER: Read the question back.

(Said question read back by the reporter.)

A He was the closest to the guy in the office

Schmeltz-cross

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that I've seen.

MS. SELTZER: No further questions.

REDIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q Mr. Schmeltz, I show you seven photographs that have been marked as Government's Exhibit 17 for identification (handing to witness).

I ask you if you recognize them.

A Yes.

Q Can you tell us where you recognize them from?

A These are the ones the agents showed me.

Q Is it fair to say that this is the photographic spread that you referred to in your earlier testimony?

A Yes.

(Said photographs handed to the Court.)

Q From those photographs, Mr. Smeltz, did you pick one of the photographs out?

A Yes.

Q As having been the person in the towing place of business as you have testified?

A Yes.

Q Is it fair to say, Mr. Schmeltz, you also picked the same individual out of the lineup?

A Yes.

Schmeltz-recross

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MR. LEVIN-EPSTEIN: No further questions
as to the motion to suppress, your Honor, from this
witness.

RECROSS EXAMINATION

BY MS. SELTZER:

Q Mr. Schmeltz, how do you know that the person
that you picked out of the lineup was the same person that
you thought was the person in the picture?

A Excuse me?

Q How do you know that the person whom you
picked out as No.3 in the lineup was the same person as the
person in the picture that you picked out when the agents
came to you with the eight different pictures?

A I don't understand --

MR. LEVIN-EPSTEIN: May I ask the witness if
he understands the question?

THE WITNESS: I don't understand.

Q You just testified that the person whom you
picked -- in response to Mr. Levin-Epstein's question, you
said that the person in the picture that you picked out was
the same person as the person you picked out in the lineup;
is that correct, or is it not correct?

I will request his answer be read back.

A The picture first and then I picked the lineup.

Schmeltz-recross

39

Q You said the person you picked out in the
lineup was the same person as the person you picked out in
the picture; isn't that what you're saying?

A Yes.

Q How do you know?

A It's the same.

Q Did the agents tell you it was the same?

A They didn't tell me anything.

Q How do you know that the person that you
picked out in the picture was the same person you picked
out in the lineup?

A They looked the same. I don't know what your--
I don't know.

Q Explain to me how you know it.

A They're the same.

Q Not because somebody told you?

A No.

THE COURT: Anything further?

MR. LEVIN-EPSTEIN: Not from this witness.

THE COURT: Anything further for the
defendant?

MS. SELTZER: No, your Honor.

THE COURT: How old are you, sir?

THE WITNESS: Twenty-two.

Schmeltz

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THE COURT: How much education have you had?

THE WITNESS: High school, started college,
but I didn't finish.

THE COURT: Do you see the person you saw
in your business establishment on the day in ques-
tion here in court?

THE WITNESS: Yes.

THE COURT: Who is it?

THE WITNESS: (indicating) The man over
there.

THE COURT: Indicating the defendant.

Are you indicating you recognize him because
of what you saw that day, or because of what happened
at the photographic lineup and the physical lineup?

THE WITNESS: From the picture and stuff --

THE COURT: I can't hear you.

THE WITNESS: With the picture and stuff
more.

THE COURT: I can't understand what you're
saying.

THE WITNESS: I recognized him with the pic-
tures, and it looks very close like the guy.

THE COURT: As you see him now, are you saying
this is the man because you remember what happened

Schmeltz

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that night or because of what happened on the
subsequent events when you were shown pictures and
you had the lineup?

THE WITNESS: Both.

THE COURT: Can you, based on what you remember from the original event, identify this man?

THE WITNESS: Yes.

THE COURT: Putting aside what you saw subsequently, are you capable of doing that?

THE WITNESS: I believe so, yes.

THE COURT: Compare what you remember that happened that day with what you now see and tell me whether it's the same person?

THE WITNESS: As best I can, it is.

THE COURT: All right.

Anything further?

Thank you very much, sir.

(Witness excused)

THE COURT: Next witness, please.

Jules-direct

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FRANCIS R. JULES, having been duly
sworn by the Clerk of the Court, testified as follows:

THE CLERK: Full name?

THE WITNESS: Francis R. Jules.

DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q Mr. Jules, what is your occupation?

A Special agent, FBI.

Q How long have you been with the FBI?

A Twenty-three years.

Q During the course of those twenty-three years,
how long have you been employed and assigned within the New
York metropolitan area?

A Twenty.

Q What is your present assignment?

A John F. Kennedy International Airport, resident
agent, FBI, Kennedy Airport.

Q I direct your attention to February 27, 1974.
I ask if you were working on that date.

A Yes.

Q Can you tell me where?

A I was in the FBI headquarters, New York City.

Q On the afternoon of the 27th of February of
this year, what were you doing?

Jules--direct

43

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2 A Conducting a lineup, New York office of the
3 FBI.

4 Q Who else was present at that lineup?

5 A The defendant Mr. Messina, his attorney, your-
6 self, Mr. Epstein and eleven agents who were there to be
7 picked for the lineup, myself, and Agent Westhoff, John
8 Westhoff.

9 Q Were there any witnesses that were there to
10 see the lineup?

11 A Yes, there were three witnesses.

12 Q I show you Government's Exhibit 1 (handing to
13 witness). I ask you if you recognize it.

14 A Yes.

15 Q What is it?

16 A The pictures of the lineup that was held in
17 the New York office.

18 Q Were you present when that photograph was
19 taken?

20 A Yes.

21 Q Is that photograph a fair and accurate repre-
22 sentation of the lineup as it finally was set up?

23 A Yes, it is.

24 Q Can you tell us briefly the circumstances from
25 the beginning to the end of that lineup?

Jules-direct

A We went upstairs to the room that we used for a lineup. I had approximately eleven agents available, and Mr. Messina's defense attorney -- I asked her to please pick out the individuals she wanted to be in the lineup, which she did. I explained the cards that are around the neck of the individuals standing in the lineup.

I then asked the defense attorney to choose how she desired the lineup, where anyone could stand. Mr. Messina removed his jacket and gave it to another agent to wear and he also removed his shirt and exchanged that shirt with another agent.

Q Agent Jules, drawing your attention to the photograph, Government's Exhibit 1, can you indicate for the Court which of the people in that array are wearing Mr. Messina's jacket and shirt.

A No. 5.

MR. LEVIN-EPSTEIN: Show it to the Court.

(Said photograph shown to the Court.)

Q Go on, Agent Jules.

A Then when the lineup was ready to go, the witness was brought in, one at a time.

Q Were they brought into the same room where the array was standing?

A No, brought in behind a two-way glass.

Jules-direct

45

Q. What happened then?

A. The witness was asked a question. "Do you know any-
one in the lineup who was the individual involved in Bob's
Towing?"

The three witnesses, one at a time, picked out
No. 3, the defendant.

Q. Did there come a time prior to the lineup,
Agent Jules, when you left your office on the upper levels
of the FBI headquarters building and went down to the lobby
to meet anyone?

A Yes.

Q. Whom did you meet?

A. I met Bavaro and Schmeltz.

Q. Did you meet anyone else down there?

A. Mantione.

Q. Did you also meet -- did you meet anyone else
in order to allow them access to the building?

A. No.

Q. Was I present at the lineup?

A. Yes, you were there. Right. I'm sorry.

1/3 Q. When you went down to meet with the three
witnesses and myself, at any time while you were in the
lobby did you notice the defendant Charles Messina in the
lobby?

Jules-direct

46

A No, I didn't notice him.

Q Did Mr. Messina come over to you and -- Had you met Mr. Messina prior to that day?

A Yes.

Q Did you engage -- Did Mr. Messina or anyone else other than the three people and myself that you've testified about engage you in conversation in the lobby?

A Not in the lobby, no.

MR. LEVIN-EPSTEIN: No further questions.

CROSS EXAMINATION

BY MS. SELTZER:

Q Agent Jules, the people who are in that photograph, exclusive of Mr. Messina, are they all FBI agents?

A Yes.

Q Do you happen to know their names?

A Yes, I believe I can remember them all.
I have to see the photograph.

Q (Said photograph handed to the witness.)

A No. 2, is Agent Bob Hadler; No. 1 is Agent John Killdommons; No. 5 is Agent Bob Kiely; No. 4 John Begley, and last, No. 6, is Leo McGillicudy.

Q Agent Jules, you had a description of this alleged -- I don't know if you want to call him a hijacker,

Jules-cross

47

or what -- did you not, from these witnesses?

A Yes.

Q Prior to this lineup?

A Yes.

Q What was the description that you had that these people had given you; what was the description?

A 5-9, 5-10, grayish hair, a solid build, complexion medium.

Q What about the description of ethnic origin? Had they also given you that?

A Apparently Italian extraction.

Q This was the witnesses themselves told you beforehand?

A Yes.

Q In this spread of FBI agents, Mr. Nadler, Killdominons, Kiely, Begley and McGillicudy, would you say they're predominantly, or, as a matter of fact, all Irish?

MR. LEVIN-EPSTEIN: Objection. That calls for a strict conclusion of the witness.

Q Would you make a conclusion?

A They're not Italian.

Q Isn't it a fact that on the day of the lineup Mrs. Seybert, who was representing the defendant, objected to the fact that there was no Italian-looking people in the lineup?

Jules-cross

48

A She didn't object to me.

Q Were there any Italian, or people of Italian origin available for this lineup, Italians?

A Apparently there weren't at this time.

Q Did you make any effort to get any?

A I had called New York and they made available eleven agents, and then the defense attorney picked out whomshe wanted.

Q She picked out from those eleven; is that correct?

A Yes.

Q Were there any Italian-looking types in the other five remaining?

A I don't remember if there were or not now. I can't give you the names of the people who were there. They were dismissed after she made her choice.

Q It was only from those eleven that she was able to pick?

A Yes.

MS. SELTZER: No further questions.

THE COURT: Thank you, sir.

(Witness excused)

THE COURT: Next witness.

MR. LEVIN-EPSTEIN: The Government calls

Mantione

49

Kenneth Mantione.

K E N N E T H M A N T I O N E, called as a witness,
having been duly sworn by the Clerk of the Court,
testified as follows:

MS. SELTZER: Excuse me, your Honor.

I was not present at the lineup, but I was
advised at the time Mrs. Seybert attempted to make
an objection to the fact that Mr. Messina was the
only Italian-looking person. I don't know if she
made that objection to Mr. Levin-Epstein.

MR. LEVIN-EPSTEIN: If Miss Seltzer wants
me to take the oath and testify, I'll be happy to.

THE COURT: What happened?

MR. LEVIN-EPSTEIN: Mrs. Seybert indicated
during the course of selection of people, in her
opinion there was nobody of these people here in
this photograph that apparently looked Italian.

I indicated to Mrs. Seybert in my opinion
the lineup array as it was set up was fair and
objective; that I didn't know what she meant by
what Italian-looking looked like.

I asked her to specify. She said, "You
know, Italian-looking."

Mantione-CROSS

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At that point I noted the objection, I believe, with the clerk from the Federal Bureau of Investigation that was present, and Mrs. Seybert was told that her objection was noted, and I also informed Mrs. Seybert that at the time of the trial if she wished to make a motion to suppress on that basis, she was, of course, free to do so. I did not think that suggestion at that point was potentially suggestive as to change the array, especially in light of the fact Mrs. Seybert had picked these people herself. She had ample opportunity to allow her client to stand in a lineup at that time.

THE COURT: Thank you. Examine the witness, please.

THE CLERK: Full name?

THE WITNESS: Kenneth Angelo Mantione.

THE COURT: Is this an identification witness?

MR. LEVIN-EPSTEIN: Yes.

THE COURT: At this identification lineup?

MR. LEVIN-EPSTEIN: Yes.

THE COURT: Let cross-examination take place.

You may cross-examine if you would like.

CROSS EXAMINATION

BY MS. SELTZER:

Mantione-cross

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Q How old are you?

A Twenty-seven.

Q Are you employed?

A What do you mean, "employed"? Now? I don't understand your question, am I employed.

MS. SELTZER: I'm not sure I know who he is.

Q Were you working?

A At the time I was working for Bob's Towing, driver.

MR. LEVIN-EPSTEIN: Could she specify which time?

THE COURT: That's clear.

MS. SELTZER: November 1973.

THE COURT: Just question him with respect to where the lineup was conducted, if you will. I don't want to repeat all of this.

MS. SELTZER: Can I ask questions if he's seen photos?

THE COURT: Yes.

Q You were present at a lineup that was subsequently held in February 1973; is that correct?

A Yes.

Q At that time I understand you picked out No. 3.

Mantione-cross

52

A I believe, yes, it was No. 3.

Q Had you ever seen that person that you picked out before?

A Well, when you say "seen before," at the time of the incident.

Q What incident?

A The time with the truck, when I was driving the truck.

Q Would you describe the circumstances under which you saw him.

A Do you want me to go through the thing?

Q Describe the circumstances under which you saw him.

A To make a long story short, I was called upon to tow a truck out of Kennedy Airport. I went there, picked up the truck, went to Washington Avenue in Brooklyn. I dropped the truck there and the gentleman questioned me was the person I saw there.

Q Did you have any conversation with him?

A Yes, I did.

Q Would you describe what the conversation was and how long it took?

A The time I moved up with the truck, large tow truck, I had the truck under hook. Let's see, I pulled up

Mantione-cross

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2 and I was given, I believe, a Sunoco or Sun gas station.
3 At the time it was American Gas station.

4 I called the dispatcher and I said, "The
5 gas station is American."

6 I was told it was a Sunoco.

7 As I was on the two-way radio, the gentleman
8 walked up to me and said, "Some Negro said to drop the
9 truck here."

10 So I told my dispatcher, "Forget about it.
11 I have a place."

12 I proceeded to drop the truck. If anyone
13 saw the picture of the place or schematic of it, you'll see
14 it's not a large place; it's about two trucks, the tow
15 truck and the truck I had on the hook.

16 I turned the truck around and I pulled her
17 on the property. I asked the gentleman to help me more or
18 less back it in, so I couldn't see the rear end of the truck.
19 I didn't want to knock down the gas pumps.

20 He did so. After I got the truck just about
21 into position, my truck was very close to the gas pumps.
22 There was no way I could maneuver any more. They asked
23 could I drop the truck, "Could you sit in the cab and steer
24 the truck back as I turn my truck around, push it backwards."

25 He did so. He dropped the truck that way.

Mantione-cross

54

I thanked him, called the dispatcher, told him I was clear, and proceeded back to the shop. My last job.

Q Did you ever get into the truck, you and this person ever in the truck?

A Not in the truck at the same time.

Q Standing outside together?

A Yes.

Q When was that?

A At the time I dropped the truck at the gas station.

Q What did you have to go, get out?

A Yes, I had to get out of my truck to unhook the other truck.

Q During that period, did you have a conversation with him?

A A short conversation.

Q What were you doing, you were unloading the truck, right?

A I had a conversation and I unhooked the truck.

Q Do you recall what the person was wearing?

A I believe it was like a light blue type of work shirt, double pockets, work-type clothes.

Q What else?

A (No response.)

Mantione-cross

55

1

2

Q Did he have a hat on?

3

A No, he didn't.

4

Q Did he have a jacket on?

5

A No, he had this work-type shirt on. I can't recall if it was a jacket, to tell you the truth, at this time.

7

8

Q You don't recall what the weather was like on that day, do you?

9

10

A I believe it was a rainy-type day. At the time it was clear visibility if you're talking about that, but I believe I recall the ground was wet. That's what I mean.

11

12

13

14

Q Was it cold? Do you recall if you were wearing a jacket or winter coat?

15

16

A I also wear a sweatshirt, pullover type jobs. I usually have a light pea jacket.

17

18

Q All this person had on was a light blue work jacket?

19

20

A I didn't have the coat. I had a sweat shirt to protect me from the oil and grease.

21

22

Q All the other person had on was a light blue work shirt?

23

24

A When I say Light Blue, it was the heavy type which you would wear something underneath, like these hunter

25

Mantione-cross

56

type --

Q An outer jacket he had on?

A Not a jacket. You know what I'm talking about.
I don't know how to describe it.

Q You're sure it was light blue?

A (No response)

Q In other words, he was warmly dressed?

A It could have been khaki or light blue.

Q Was he warmly dressed or dressed for the
weather?

A It seemed so.

Q Would you get me a description of the person--
Withdrawn.

Q Did you ever give a description of the person
that you had seen to the FBI, to any other authorities?

A Yes, I did.

Q Who was that, and what was the description?

A (No response)

Q To whom did you give the description?

A I gave it to, I believe, the Port Authority
detectives and the FBI.

Q What was the description that you gave?

A Gentleman, stock built, basically -- sandy-
colored hair, described, black and white. You know what

Mantione-cross

57

1
2 I'm talking about? Bushy at the time and shorter than I was.

3 Q How tall are you?

4 A I'm 6-1.

5 Q Did you give him any idea how much shorter?

6 A I believe I described the gentleman would
7 come up to my nose (indicating), something like that.

8 Q Did you describe the clothing to them?

9 A Like I did to you. I mean, at the time
10 I didn't know anything was involved, and I didn't get my-
11 self that much involved -- you know, a conversation with
12 the gentleman, asking him to help me out. That was it.

13 Q By the way, do you recall what time it was
14 that you pulled into this Sunoco gas station?

15 A Again, it's quite a long time. I believe
16 I recall someplace around nine o'clock.

17 Q Nine o'clock in the morning?

18 A No, this was at night. I can't recall, because
19 I usually knock off at ten o'clock. This is my last job.
20 I was annoyed I had to take the last job. I believe it was
21 at the time around nine o'clock when I dropped it off, maybe
22 a little later, 9:30. I can't recall the time now exactly.

23 Q It was dark outside?

24 A Yes.

25 Q Was the Sunoco station open?

Mantione-cross

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A It was American gas station. No, it wasn't.

Q Could you describe the lighting conditions that were present?

A All the lights were on.

Q All the lights were on?

A Yes.

Q Was there anybody present --

A Nobody there. The gentleman happened to walk up to me, say that, "A Negro told me this is the place. I dropped off the truck, and at the time I did say that when I was in the truck, backing it up, driving it off, a Volkswagen bus pulled up with a Negro, tall as I or taller. I believe he was taller, talked to this gentleman, and I didn't hear what they were saying. I wasn't paying attention. I was standing with them for a minute. That was about it.

Q When the person first came up to you, did he come from inside the gas station?

A He was standing on the property, the property of it.

Q Was he inside the building itself?

A No, he wasn't. The building was locked.

Q Did there come a time when -- Withdrawn.

Q When you went to the Port Authority, did they

Mantione-cross

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ask you to help in drawing a composite sketch?

A Yes.

Q Did you, in fact, do that?

A Yes, I did.

Q Would you tell us what happened?

A They showed me things to put together, you know, a picture of the gentleman. I did so. That's about as simple as I can put it.

Q They had an artist there?

A I don't know if he was an artist.

Q They had somebody there --

A Somebody there to show me eyebrows, whatever it is. I don't know if that's the procedure usually or not.

Q Did they finally come up with a picture?

A Yes.

Q Did you see the picture?

A Yes, I did.

Q Did you say anything about the picture?

A I said it looked quite a bit like the gentleman; it was the best you can probably do with a drawing.

MS. SELTZER: I would again request the Government produce the composite sketch.

MR. LEVIN-EPSTEIN: The Government has not had the opportunity in the last ten minutes to

Mantione-cross

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1
2 obtain that. The Government has already told
3 Miss Sentzer that they would provide it, your
4 Honor.

5 Q Were any of the other people at the towing
6 station with you when you went to the Port Authority?

7 A I don't understand the question.

8 Q When you went to the Port Authority to look
9 at pictures, to make the composite, was there anyone else--

10 A At that time, I believe I went down once
11 with Robbie, the guy with the glasses, and that was the only
12 time I think I went with somebody -- maybe -- I'm trying
13 to think.

14 The first time, I believe I went down twice,
15 the second time was with Robbie. The first time I can't
16 remember what the circumstances were.

17 Q The first time you went down, did they ask
18 you to pick out pictures from some books?

19 A I looked, I guess the cliché mug shots,
20 and like I say, composite, whatever they call them, put
21 together something.

22 Q Did you pick anyone out?

23 A The first time?

24 Q Yes.

25 A Out of these so-called mug shots, I don't
believe I picked anyone out of those mug shots. That was

Mantione-cross

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another time.

Q Was that day the same day that the composite sketch was made that you looked at the mug shots?

A Yes.

Q That day you don't recall picking out any pictures from the mug shots?

A No.

Q Was there a later time when you were asked to make some form of identification?

A Yes.

Q What was that and when was that?

A I know I saw the pictures. At one time it came to a job --

Q What pictures?

A Photographs for me, snapshots.

Q When was that?

A I couldn't tell you the day. It doesn't mean anything to me.

Q How much later than the original time of towing was this?

A Roughly a month I would say, or less, less than a month.

Q Will you describe what happened on that occasion?

Mantione-cross

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1
2 A The basis of my recollection, they showed me
3 a few photographs. Out of the few they asked, "Does any one
4 look familiar?"

5 At the time I said yes. I showed them the
6 photograph, and that was it.

7 MS. SELTZER: I would ask the Government to
8 produce that spread and the identified --

9 MR. LEVIN-EPSTEIN: The spread is marked
10 as Government's Exhibit 17 and shown to Miss Seltzer.

11 MS. SELTZER: This was the only spread ever
12 shown? No other spreads?

13 MR. LEVIN-EPSTEIN: That is correct.

14 Q Did they come to you at any time after that
15 with any other photo spreads?

16 A I believe after that I went to the FBI building
17 in Manhattan.

18 Q When was that?

19 A Like, again, I don't put dates down.

20 Q What happened at the FBI building in Manhattan?

21 A Again, I believe I went there twice. The
22 first time I think was to see some photos again.

23 Q This was after you had picked out one picture
24 of the eight they had shown you?

25 A Something like that.

Mantione-cross

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Q Let me show you these pictures (handing to witness), Government's Exhibit 17. If you recall, were these the pictures shown to you?

A I believe so. There's quite a few there, reminded me at the time.

Q Do you recall which picture you picked out?

A This one here (indicating).

MS. SELTZER: Indicating the picture of Charles Messina.

Q Did you make any statement at the time you picked the picture out?

A Yes, looked like the gentleman. At the time, of course, the gentleman was wearing regular type of clothes, and the hair was bushy.

Q When you picked him out, did you say you were certain it was him or could have been him or might have been him?

A They say as far as the answer like that, they say --

Q What did you say to the agents then?

A "I believe that's the gentleman."

Q Did they say anything to you?

A They said, "O.K., that's it."

Q Did you say anything to them to the effect that

Mantione-cross

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1
2 you weren't sure, but you would like to see a lineup, or
3 anything like that?

4 A What do you mean? Talking about the picture
5 again or the time of the lineup? I don't understand the
6 question.

7 Q At the time you identified this picture,
8 did you tell --

9 A I told the gentleman, whoever it was, at the
10 time, exactly what I said to you now, "Looks like the gent-
11 leman except has bushier hair."

12 Of course, it's the pictures of the person's
13 face.

14 Q Did you tell him you would like to see him
15 in person?

16 A No, I didn't. I didn't bring it up.

17 Q Did they ask you?

18 A Yes.

19 Q What did they ask you?

20 A I believe something to the effect that,
21 "Do you think you could identify him if you saw him in
22 person?"

23 Q What did you say?

24 A I said, "I believe so."

25 Q Now, you say subsequent to this time you were

Mantione-cross

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again shown some pictures at FBI headquarters; is that correct?

A Subsequent to what time?

Q To the time you identified these (indicating).
Where were you when you identified those?

A Those on my job, the first time I saw those.

Q Then you were then asked after that to go
down to FBI headquarters?

A I think the time after that before the lineup.

MS. SELZER: Your Honor, I would request
that Mr. Levin-Epstein does not nod his head when
the witness gives the right answer and communicate
with the witness during the testimony.

THE COURT: Both counsel are so instructed.
Go ahead.

MS. SELTZER: Thank you.

Q Before you stated that you believed that you
had been down to FBI Headquarters twice.

A I was down -- the way it was, I started a new
job in December of '73. I don't believe it was more than
two weeks, something like that, I have asked to go down
to the FBI building. I went down at that time.

I was on the job. They came to see me.
I believe it was the detective that came to see me at that

Mantione-cross

66

time and one time after I went down.

Q How many times were you asked to look at pictures at FBI headquarters, not Port Authority?

A Once. I believe it was once. A lot of things transpired since then.

Q I understand. That was after you identified these pictures?

A Yes, at this time that's what I remember.

Q Would you describe what happened when you were called down to the FBI headquarters to look at other pictures?

A I don't believe I was shown any of those photographs. I think I was shown some other, a portfolio or something. I didn't identify any.

Q You didn't identify?

A I don't believe so.

Q Are you sure you didn't identify or you think.

A The folio, I didn't identify. The only pictures I identified were the photographs like this (indicating).

Q I'm talking now about the day that you were at the FBI headquarters to identify pictures, not the day they came to your job.

A Right.

Mantione-cross

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Q Did you identify any pictures at all on that day, whether from a portfolio or that were loose like this (indicating)?

A I remember there was one picture I believe I said could be this person. I believe it checked out it couldn't possibly be, or something like that.

Q Just answer the question. You did pick out a picture?

A Yes, I think so.

MS. SELTZER: I would request the Government to produce that picture.

THE COURT: Do you have it?

MR. LEVIN-EPSTEIN: We don't have it, your Honor.

MS. SELTZER: I request the Government explain why not.

MR. LEVIN-EPSTEIN: I'm told that Agent Jules has the explanation, your Honor.

THE COURT: What is it?

MR. JULES: After the theft occurred, which is normal routine, we sent Kenneth to the New York office of the FBI, where we maintain folders, mug shots. He went through those folders. No positive identification was made, and in our normal course

Mantione-cross

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of business we don't keep a record that he looked
at, say 150 photos.

THE COURT: I see.

MS. SELTZER: I understand he did pick out
one. What happened to the one he picked out?

MR. JULES: He said he picked out one.

I don't recall him picking out one that was a look-
alike or had anything to do with the case. There-
fore, no further investigation was conducted on
the basis of his identity, if he made one.

Q You subsequently went down in February to
observe the lineup, right?

A I believe it was February, yes.:

Q When you went down for the lineup, where were
you waiting until you were called into the lineup room?

A I don't know, a lab room or something like
that. You know, by ourselves.

Q Was there anyone in that room with you?

A Just the other two guys I worked with.

Q Did you have a conversation with them at the
time about the person you had picked out?

A Not really.

Q Did the three of you ever compare notes as
to what you thought the person looked like from what you

Mantione-cross

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could recall?

A Not to my recollection.

Q You had no discussion at all?

A Not really. You know, let's face it. It's the first time that I've been involved in something like this.

Q You didn't discuss it?

A Not really. Just joking around and say, "I don't believe what's happening," or something like this.

Q Who was the first person to go in to the lineup?

A Out of us three that identified?

Q Yes.

A I was the first or second, I think; I don't even know, to tell you the truth. It didn't mean nothing to me. It was going in. I can't remember now.

Q Do you recall one of the other fellows coming out and saying that he had made an identification?

A There might have been something like that, nothing of who you picked out that I could remember.

Q Try to remember. Did it happen or didn't it?

A Wait a second. If you mean before I went in, no, not at all.

Q There was no discussion --

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A I don't believe we even saw each other. It was like he walked one way I walked the other way.

Q After you made your selection, picked out No. 3, did you go back to that room or did you leave headquarters?

A I believe we were let out of the room for a minute or something.

Q Did you all three leave together?

A We went down the elevator together, but after that, our separate ways.

Q There was a period of time between the time you made your selection and the time the other two witnesses made their selections that you were together?

A Yes, in the elevator, one of the FBI men.

Q There was a period after one of you had come out, you were to go prior to the time that another one of you went in?

A If you're trying to say that after the identification we were together at some time, yes.

Q Did you have any conversation at that time?

A No, not really. We were joking around and we just like more or less looked at each other to say, "Did you identify anyone?" All of us looked at each other like we saw someone in the lineup, not saying which number.

Mantione-cross

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Q Do you recall what you said?

A Nothing as far as the case, we didn't. There was an agent there, and I didn't know if I was supposed to say anything. I kept my mouth shut.

Q You told the other guys you picked out someone?

A The type of relation, if you look at someone and you know you spotted someone that you recognized.

Q The other guys knew there was somebody in there, at least one of you knew?

A All three of us, more or less.

MR. LEVIN-EPSTEIN: Objection.

THE COURT: Go ahead with your question.

Q Did each of you know whether it was by verbal or non-verbal communication that there was somebody in the lineup who had in fact been picked up by you?

A I believe so, because, you know, you saw someone you think you identified. I'm sure everyone felt the same way.

Q When you had given a description of the person whom you had seen at the American station, had you described to him of being as Italian descent?

A Yes, I did.

Q When you went in to look at the lineup, and

RE: IDENTIFICATION

Mantione-Cross

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1 I show you the picture --

2 A May I see the picture?

3 Q -- of this lineup (indicating; handing to
4 witness), what do you mean by that?

5 A I am from Italian descent. I think it's
6 something that is natural to anyone who lives in this
7 country, to have a cliché of saying that a Jewish person--

8 Q I understand. What do you mean? How --
9 I'm not trying to be derogatory. Do you say somebody
10 looks Italian, what do you mean by that?

11 A Look like my family, o.k.?

12 Q I ask you to look at that picture. You say
13 you're Italian?

14 A Yes.

15 Q If you can, would you point out if there's
16 anyone else besides No. 3 in that picture who looks Italian
17 to you?

18 A I would say about two or three gentlemen be-
19 sides No. 3.

20 Q Who would you say?

21 A No. 6, 4, and possibly 5. The other two
22 gentlemen look Irish.

23 Q Which -- I'm sorry. Which did you say?

24 A I would say No. 4 and 6 look Italian to me.
25

Mantione-cross

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Q No. 4?

A I'm telling you from my family.

MR. LEVIN-EPSTEIN: The witness has testified in response to Miss Seltzer's question. If she's not happy with the answer, she shouldn't have asked the question.

MS. SELTZER: That's o.k., No. 4 and No. 6.

A (Continuing) Again, I'm going with -- you're questioning me. I have to go with my knowledge of my prior experiences.

Q Italians are known because they have longer noses --

MR. LEVIN-EPSTEIN: Objection. :

THE COURT: Don't pursue it any further.

Continue.

Q When you identified Mr. Messina at the lineup were you identifying him because you recognized him as the person in the picture that you had selected in this spread that was presented to you at your job?

A No.

Q Are you sure of that?

A Yes, I am. Of course, let's face it. It's related because of the fact you've seen a picture. At the time, I'll state it again just as I've stated every time

Mantione-cross

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I've seen the gentleman who sees this, it looks like the gentleman. Of course, he had bushier hair. I'm being as honest as I can.

Q Are you absolutely certain that the person who was at the American station was Mr. Messina?

A Let me put it like this: I don't have fingerprints and I'm not an expert in anything.

Q I'm asking you on the basis --

MR. LEVIN-EPSTEIN: The witness has answered the question.

MS. SELTZER: I don't think the witness has answered the question.

A As far as my recollection, this gentleman looks like the gentleman I met at the station. He's not my father. I don't see him every day. What am I supposed to tell you?

Q You're supposed to tell me whether you are certain with all the powers of observation that you have, whether Charles Messina --

A Let me answer you. If this man was going to the gas chambers, I would say I wasn't positive. What am I supposed to tell you?

Q Thank you. That's exactly the answer I want.

MR. LEVIN-EPSTEIN: Let the record indicate that the man is not charged with a capital crime.

Mantione-

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The witness has answered Miss Seltzer four or five times.

THE COURT: I've heard it.

Do you have any further questions?

MS. SELTZER: No.

THE COURT: Do you see the man that you saw at the gas station in the courtroom?

THE WITNESS: I believe I do.

THE COURT: Who is it?

THE WITNESS: The gentleman on the end, again.

THE COURT: Are you remembering that now because of the lineup or the pictures or because of what you saw at the time?

THE WITNESS: I believe -- I'd say at the time of the gas station, this gentleman looks like the same man, except bushier hair.

THE COURT: Thank you very much.

Are there any witnesses that defense counsel wishes to call?

MR. LEVIN-EPSTEIN: Just for the clarity, let the record indicate that the man at the end at this time as well as -- the defendant, Charles Messina.

THE COURT: Very well.

1 THE COURT: Do you have any witnesses you
2 want to call?

3 MS. SELTZER: I understand there were three
4 people.

5 THE COURT: Do you want to call another
6 witness? I'm satisfied the Government has met its
7 burden of proof here.

8 If you want to call any witnesses, you may.

9 MS. SELTZER: I would just ask Mr. Levin-Epstein
10 if these three were the only people -- these two
11 people were the only people that picked him out
12 at the lineup.

13 THE COURT: There was a third.

14 MR. LEVIN-EPSTEIN: Correct.

15 THE COURT: Who is it?

16 MR. LEVIN-EPSTEIN: Robert Bavaro.

17 THE COURT: Do you want to call him?

18 MS. SELTZER: If he's not going to be called
19 in the case.

20 MR. LEVIN-EPSTEIN: I'm perfectly willing
21 to put Mr. Bavaro on for the purposes of the identi-
22 fication.

23 THE COURT: Do you want him called?

24 MS. SELTZER: Yes.

25 MR. LEVIN-EPSTEIN: I can represent to the
Court his testimony would be substantially the same.

EXCERPT FROM TESTIMONY OF ROBERT BAVARO-CROSS EXAMINATION⁷
RE: IDENTIFICATION

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SS:jk
AM R5

Bavaro-cross

ROBERT BAVARO, called as a witness, having
been first duly sworn by the Clerk of the Court,
took the stand and testified as follows:

THE CLERK: Full name?

THE WITNESS: Robert Bavaro.

THE COURT: Do you want to examine him? You may.

CROSS-EXAMINATION

BY MS. SELTZER:

Q Mr. Bavaro, I understand that you were present
at a line-up that was held in February of 1974 at FBI
headquarters?

A Yes.

Q At that time did you pick an individual out at
that line-up?

A Yes.

Q I show you a picture. Do you recall who that
person was that you picked out?

A This man (indicating).

MR. LEVIN-EPSTEIN: Let the record indicate that
the witness has pointed to No. 3, the defendant,
Charles Messina.

Q When you picked out Mr. Messina at the line-up,
did you make any statements at the time you picked him out?

A The FBI asked me if I was sure this was the man

Bavaro-cross

that I saw. I said, "Yes."

Q When was it that you say you saw him previously?

A The day we towed the truck.

Q When was that?

A I don't know the date. It was on a Sunday. I don't know what month.

Q Do you recall -- you don't recall the month?

A No. I don't.

Q Do you recall about how long ago it was?

A It could have been about three or four months ago.

Q Would you describe the circumstances under which you saw this person?

A I was a dispatcher at Bob's Towing.

Q What happened?

A The gentleman came up and wanted his truck towed from the airport.

Q When did he come up, do you recall what time of day it was?

A It was in the afternoon.

Q Late afternoon or early afternoon?

A Early, I believe.

Q About 1:00 o'clock.

A Something around there.

Bavaro-Cross

Q What did he say to you?

A That he wanted a truck towed from the airport.

Q What did you say to him?

A I said, "Yes, we can do it."

Q Do you recall what this person looked like?

A Yes.

Q Would you tell us?

A I forget what he was wearing. He had gray hair, beige-blond hair. Had a hat on, and some gray hair on around the sides of the hat, well dressed man.

Q Well dressed?

A Yes.

Q Do you recall what kind of a hat it was, like a construction worker's hat?

A No, no. It was a Russian-type hat, furry.

Q Do you recall what he was dressed in, a suit or tie?

A He had a raincoat on and I believe he had a suit on.

Q Do you recall what color the raincoat was?

A It was tan.

Q Did he take the raincoat off?

A No.

Q Now, for how long a period of time was he in the

BAVARO-CROSS:

towing office?

A Was there about twenty minutes.

Q Was he with you most of the time or was he with anyone else?

A There was three of us up there.

Q What happened; did he talk to you first?

A No, he was talking to Robbie because I was at the desk and Robbie was behind me. When he walked in, he was closer to Robbie.

Q He went right in and talked to Robbie?

A Right.

Q What did you do, did you have anything to do with the whole thing or were you sitting there?

A I was sitting there. I had a call on the job from the night before that was left over to me.

Q In other words, did you have any conversation with the person that came in?

A No, not really. I can't say I didn't. I asked him what was in the truck. He told me nuts and bolts. That's all I said to him.

Q When he was talking to Robbie, was Robbie sitting in back of you?

A Yes.

Q Were you looking at Robbie at the time or were

5

Bavaro-cross

1
2 you looking at whatever you were doing?

3 A I was watching television.

4 Q When the agents came some time later, to talk
5 to you about this whole incident, did you give them a
6 description of the person who you remember having come into
7 your towing service?

8 A Yes, I did.

9 Q What was that description?

10 A Same thing I gave him.

11 Q What was that?

12 A Man wearing a type of hat, well dressed. You
13 know.

14 Q Did you say anything else about him?

15 A No, I didn't.

16 Q Did you describe the clothing to him at that
17 time?

18 A No -- yes, I did.

19 Q Did there come a time when you were brought
20 down to the Port Authority?

21 A Yes.

22 Q Were you asked to pick out any people at the
23 Port Authority of any books that they had?

24 A No.

25 Q Were you asked to assist in the making of a
composite picture? Do you know what it is?

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BAVARO-CROSS

2

A Yes.

3

Q Did you help with that?

4

A Yes.

5

Q Did they come up with a picture?

6

A Yes.

7

Q What did you think of the picture they came up

8

with?

9

MR. LEVIN-EPSTEIN: Objection.

10

THE COURT: I'll allow it.

11

Q Did it look like the person who had come into --

12

A Yes, I did.

13

MS. SELTZER: I would again ask at some time

14

during the trial that picture, too, be produced.

15

Q Did you say anything to them about the picture

16

at the time?

17

A No, I didn't.

18

Q Did you tell them it looked like the guy?

19

A That's it.

20

Q You didn't pick out any pictures that day from

21

the album?

22

A No.

23

Q Did there come a time when the agents showed you

24

a spread of photographs?

25

A They showed me a couple of pictures, yes.

Bavaro-cross

Q When was that?

A About a month later, something like that.

Q Where were you when they showed you that?

A At the job.

Q Was anybody else present or any of the other witnesses, was Bob or was Robert Schmeltz or Kenneth Mantione present at the time?

A No.

Q When the agents came in, did they say anything to you about the pictures?

A Just wanted me to take a look at them, pick out the best one to my knowledge that I saw.

Q Did they tell you that they thought one of the people in the picture was the person that had come in that day?

A They said one of the pictures would be the same, almost identical as the one I had drawn up.

Q Did you in fact pick somebody out?

A Yes, I did.

Q Are these the pictures they showed you (indicating)?

MR. LEVIN-EPSTEIN: Let the record indicate Miss Seltzer is handing Government's Exhibit 17 to the witness.

Bavaro-cross

Q Do you recall if that's the picture you picked out?

A Yes. (indicating)

Q Do you recall what you said?

MS. SELTZER: Indicating Charles Messina's picture or what appears to be Charles Messina's picture.

Q Do you recall if you said anything at the time you picked this picture out, did you say it could be the guy or might be the guy or definitely is the guy or something to that effect?

A Something to that.

Q Which one?

A I don't recall.

Q When you saw the picture, try if you can to remember what you thought. Did you think that's definitely him or would you think it looks like him or something like that?

A To the drawing and to the picture, it was identical.

Q What about to the person that you saw in the office that day?

A I only took a couple of glances at them, turned around to look behind me when he was speaking to Robbie.

Q You didn't see him too well?

Bavaro-cross

A Didn't --

MR. LEVIN-EPSTEIN: Objection.

THE COURT: I'll allow it.

Q Is that what you're trying to tell us?

A (no response)

Q Let me ask you something. When you made up that composite picture, did they make one for you and one of the fellows or did they together, all of you, come up with one picture; was there one composite picture made for the three of you --

A We went separately. I don't know if what happened with the other two fellows.

Q You don't know if it's the same picture the other two fellows had?

A No.

Q Do you actually remember and I understand it's difficult, but do you actually remember what the person looked like who walked into the towing that day or did you make your identification because you remembered what the composite had looked like, what the photograph had looked like? Can you honestly say you remember what that man looked like?

A No, not really. I took a couple of looks at him. Then they came back and said, "The truck was hijacked" and they wanted us to draw a picture. I remember a couple of

Bavaro-cross

parts about him. That's about it.

Q So when you're making your identification, when you made your identification at the line-up, were you making this identification because you remembered pictures that you had seen?

A I would say the best of my knowledge I did what you may call it. When they drew up the pictures, in the line-up, it looked like the same man.

Q So that -- do you identify the person who was in the picture as being in court today?

A Yes.

Q Who is that?

A The gentleman over there (indicating).

Q When you're identifying Mr. Messina --

THE COURT: Indicating the defendant.

Q Are you identifying him because you've seen him at the line-up and because you saw his photograph when they brought it to you or are you identifying him because you remember him as being the person that was in Bob's Towing?

A I can't really say for sure. He was the man at Bob's Towing -- I only turned around and saw him a couple of times.

MS. SELTZER: No further questions.

MR. LEVIN-EPSTEIN: one question on redirect.

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Bavaro-redirect

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REDIRECT EXAMINATION

3

BY MR. LEVIN-EPSTEIN:

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Q Does the defendant Charles Messina, as he sits

5

here, resemble the man that came in to Bob's Towing that day?

6

A Yes.

7

Q When you looked at the photographs shown to you,

8

the photograph that you picked out, was that the man in the

9

photograph also resembling the man that came into Bob's

10

Towing?

11

A Yes.

12

Q And when you looked at the line-up at the FBI

13

building and you picked out No. 3, the defendant, Charles

14

Messina, did he appear like the man who came in to Bob's

15

Towing?

16

A Yes.

17

MR. LEVIN-EPSTEIN: No further questions, your

18

Honor.

19

THE COURT: Thank you, sir.

20

Any other witnesses at this hearing?

21

MS. SELTZER: No, your Honor.

22

THE COURT: Do you want to call any witnesses

23

for the defendant?

24

MS. SELTZER: No, your Honor.

25

THE COURT: The motion to suppress the

12 1 Bavaro-

2 identification is denied.

3 Do you want another hearing now?

4 THE DEFENDANT: If your Honor please, can I ask
5 my attorney a question?

6 THE COURT: Yes, of course.

7 Anything else?

8 Any other motions to suppress?

9 MS. SELTZER: Yes, I understand the Government
10 is going to introduce certain sweaters. I believe
11 those are the sweaters taken from Mr. Messina
12 subsequent to the arraignment. I understand they're
13 going to introduce different statements that were
14 taken from Mr. Messina.

15 THE COURT: Are you introducing any statement?

16 MR. LEVIN-EPSTEIN: We have obtained certain
17 statements from Mr. Messina which has not yet been
18 decided if we're going to offer them.

19 THE COURT: Do you want to proceed without
20 offering them?

21 MR. LEVIN-EPSTEIN: No, we would like to
22 reserve the right to offer them at the trial.

23 MS. SELTZER: We can have a hearing.

24 MR. LEVIN-EPSTEIN: Voir dire on the statements.

25 THE COURT: Mark a blue and whitesweater, in a

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Bavaro

transparent package.

THE CLERK: Government's Exhibit 18 for
identification.

(So marked.)

MR. LEVIN-EPSTEIN: Shall I call the witness?

THE COURT: Yes. Where did these come from?
(indicating).

MR. LEVIN-EPSTEIN: These sweaters were
voluntarily turned over to Detective Dominick Maiola,
the Port Authority Police Department, by the defendant
Charles Messina at his residence.

THE COURT: Are these part of the cargo; is
that it?

MR. LEVIN-EPSTEIN: The Court will adduce
evidence at the time of trial to show these are
significantly resembling as part of the cargo to be
probative.

THE COURT: Call the witness.

MR. LEVIN-EPSTEIN: I'm informed the detective
who obtained these sweaters from Mr. Messina is
actually engaged in a trial in Queens County -- a
proceeding in Queens County Court as a result of an
arrest he made over the weekend and he is not here at
this time.

4 Bavaro - cross

A Could have been an hour. Could have been three.

Q Well, could you try to remember at what time of the day it was that the person came into the office?

A It was in the early afternoon. Could have been about 1:00 o'clock.

Q When he came to the office, what was -- did you see him walk into the office?

A Yes.

Q Was anyone else in the office with you?

A Yes.

Q Who was in the office?

A Robbie and Kenny.

Q There were two people?

A Excuse me. Robbie -- Robbie and somebody else. I don't know who else was in the office. It was me and Robbie, though.

Q Excuse me.

A Robbie and myself were there and I think I had a friend of mine there. I'm not sure.

Q Approximately 1:00 o'clock this gentleman walked in?

A Yes.

Q Did he walk up to you and talk to you or did

he walk up to one of the other people?

A Fobbie was right there. He started talking
to Fobbie?

Q And what were you doing at that time?

Q I was watching television.

Q Do you recall what you were watching?

A No. I don't.

Q Do you recall actually seeing this man walk in or were you just watching television and didn't realize he was there?

A No. When he walked in I turned around. To see who had come in.

Q Did then what did you do after you turned around?

He -- I asked him if I could help him.

Q Well, did he first speak to Robbie or did you go back to watching the television?

A. House no?

Q I say, when he came in, did he speak to you first or did he speak to Robois first?

A He walked in and Robbie said, can he help him. And I turned around and said the same thing. And he says he's the owner of the truck in the airport and he'd like to pay up for the job.

6 Bavaro - cross

Q And then what happened?

A Robbie wrote him out a receipt. He paid us.
And asked us about what time would we pick up the truck
and he had left.

Q Now, did the man ever identify himself?

A No.

Q He never told you what his name was?

A No, he never said.

Q Well, do you have any idea what name it was
that it was signed on -- on the authorization to tow?

A I didn't -- I didn't see the authorization
to tow.

Q Well, --

A I didn't look at it.

Q Do you recall what this person was wearing?

A He was wearing --

Q When he walked in.

A He might have had a suit on but he had a rain-
coat on.

Q You recall what color that raincoat was?

A I believe it was tan.

Q A tan raincoat?

A Yes.

Q Was it raining out that day?

7 Bavaro - cross

A I don't recall.

Q Now, while Robbie was writing out the authorization to tow, what were you doing?

Did you go back to watching television?

A Yes.

Q And did you have any -- any conversation with this person?

A I had asked him the weight of the truck. And he had told me there wasn't hardly anything in it. I asked him what was in it. He told me nuts and bolts, about 9000 pounds.

Q When he said nuts and bolts, did you think that he seriously meant nuts and bolts or did you think he was saying it's none of your business?

MR. LEVIN-EPSTEIN: Objection as to relevancy.

THE COURT: I will allow it.

THE WITNESS: Usually we go by what they say.

I don't question them. If they say it's nuts and bolts, I believe it's nuts and bolts.

Q You didn't think he was just telling you to mind your own business?

A No.

Q Now, in the towing business, is there any

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Bavaro - cross

witness's company stole the truck.

I object as to form.

MISS SELTZER: I would certainly never infer
that.

MR. LEVIN-EPSTEIN: Object as to form.

THE COURT: I will allow you to answer.

Do you understand the question?

THE WITNESS: Yes.

THE COURT: All right. You may answer.

THE WITNESS: I learned that the truck was stolen
three days after.

BY MISS SELTZER:

Q How did you learn that?

A From the FBI.

Q What happened?

A They had come to the shop.

Q And what did they tell you? Do you remember
who specifically came?

A No, I don't remember their names.

Q What did they tell you at that time?

A They were speaking to my boss and then he had
been called in from the road. And they wanted to know how
-- how this all occurred, the call, where it was going and
such and such.

6

Bavaro - cross

Q Did they ask you if you had ever seen a registration?

A I don't recall.

Q Did they ask you if you had asked for any identification from Mr. Lamont?

A I don't recall.

Q Did they ask you if he had given you any keys for the truck?

A I don't recall that.

Q What did they tell you? What did they ask you?

A They asked us if we had taken an authorization from the man and did he pay us for it and that was it.

Q Did they ask you for a description of the man?

A Yes, they did.

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Bavaro-cross

Q Do you recall what description you gave?

A Yes, I do.

Q What was that description?

A It was a man wearing -- like a Russian hat.

Fluffy hat. He had gray hair around the sides. Tan trench-
coat. Well dressed.

Q Did you describe his height or weight?

A His height was about 5'9". Something like that.
His weight was about 190.

Q Did you tell them that at that time?

A Yes, I did.

Q Did you tell them anything about the way he
looked, about the ethnic origin or anything like that?

A I don't recall.

Q Now, did the agents ask you to come down and
look at some pictures?

A No. They asked me to come down and they will
draw up a picture.

Q What in fact happened then?

A We had drawn up a picture.

Q Did the picture look like the man?

A Yes.

Q You thought it was?

A Yes, it did.

2 Bavaro-cross

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2 Q Well, what else did they do? Did they have you
3 look through some books?

4 A No.

5 Q You didn't look at any books of pictures?

6 A No.

7 Q How long after the -- how long after November
8 25th was this that you were asked to draw up this picture?

9 A About a week later.

10 Q And then did you have any contact after that
11 time with the FBI or any agents?

12 A Yes. They had come back to the shop with a
13 couple of photos.

14 Q When was that?

15 A About a week later. After the drawing.

16 Q Now, you picked out one of those photos as
17 looking like the person who you thought was in your truck
18 you serviced that day; is that correct?

19 A Yes.

20 Q About how long did you have an opportunity to
21 look at those pictures?

22 A As long as I wanted.

23 Q How long is that?

24 A About ten minutes.

25 Q Did you get a look -- a good look at the picture

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Bavaro-cross

that was shown to you?

A Yes, I did.

Q Then at a later time you were asked to come to
a line-up; is that correct?

A Yes.

Q At that line-up you picked out the same person
that was in the picture that you identified that day; is that
correct?

A Yes, I did.

Q That person that you picked out out of the
line-up was Charles Messina; is that correct?

A Yes.

Q Now, you are identifying Charles' Messina as
being the person that was in your truck you serviced that
day?

A Yes.

Q Now, when you were identifying him, were you
identifying him because you saw the picture, because you saw
a composite picture, or are you identifying him because you
remember that he was actually in the towing service that day?

A I remember from a lot of parts. From when he
was in the -- in Bob's Towing Service and from the composite.

Q Well, can you actually say that you know this
time whether what you are remembering is a picture you saw

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Bavaro-cross

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2 or a person that was in the towing service?

3 A From the person. Trying to pick him from the
4 person that was in the towing service. Not from the picture.
5 I don't keep looking on at the picture.

6 Q Do you remember testifying here yesterday?
7 Do you remember testifying in a hearing that we held yester-
8 day?

9 A Yes.

10 Q Do you remember being asked that same question
11 by me?

12 A Yes, I do.

13 Q Do you remember being asked:

14 "Question: So when you are making your identification --
15 when you are making your identification at the line-up, you
16 are making the identification --"

17 THE COURT: Excuse me, Miss Seltzer, when you
18 read from a document would you mind giving the page.

19 MS. SELTZER: Page 86.

20 THE COURT: Thank you.

21 Q "Question: Were you making this identification
22 because you remembered pictures that you had seen?"
23 Do you remember being asked that question?

24 A Yes, I do.

25 Q Do you remember giving this answer:

"I would say, the best of my knowledge, I did what you

5 Bavaro-cross:

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would call it when they drew up the picture in the line-up.

It looked like the same man."

Do you remember giving that answer?

A Yes.

Q Now, when were you told that you were to be a
witness at this trial?

A Last Friday.

Q And who told you that?

A The District Attorney.

Q Mr. Levin-Epstein?

A Yes.

Q Did he call you up to his office at that time?

A Yes, he did.

Q Did he have a discussion with you?

A Yes.

Q What did he discuss with you at that time?

A He discussed the case.

Q Did he tell you that you were going to have to
identify Mr. Messina?

A Yes.

MR. LEVIN-EPSTEIN: Objection.

THE COURT: Overruled.

Q What else did he tell you?

A I don't recall too much.

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Bavaro-cross

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Q Well, try. Did he tell you that Mr. Messina
would be in the courtroom?

A Yes, he did.

Q And did he tell you he was arrested and accused
of the crime?

A I don't recall that.

Q Well, did you know why you were being called
to testify?

A Yes.

Q You were being called to testify against
Mr. Messina?

A Yes.

Q You were being called to identify him as the
person at the towing service?

A Yes.

Q What else were you told?

A To answer my questions truthfully and honestly
and that the gentleman would be here.

Q The gentleman would be here?

A Yes.

Q He would be seated at the counsel table?

A Um hum.

Q You wouldn't have any trouble picking him out?

A No.

1 Q Now, how long -- you say he was in the towing
2 service for 20 minutes, right?
3

4 A About that.

5 Q For what period during that time did you actually
6 get a chance to look at him?

7 A I didn't get that.

8 Q During the time that this man was in the towing
9 service --

10 A Yes.

11 Q (Continuing) -- how many of the minutes that he
12 was there did you actually have a chance to look at him? Or
13 were you not watching television or talking to your friend
14 or filling out forms, whatever you were doing?

15 A I turned around a couple of times.

16 Q A couple of times?

17 A And took a look at him.

18 Q You were sitting and he was doing other things,
19 right?

20 A Right.

21 Q And yet you are absolutely positive that the
22 person you are identifying is not the person that you saw
23 in the picture, but the person you saw that day?

24 A Yes.

25 Q Did you ever get in any kind of trouble -- were

1 6 Schmeltz-cross

2 A Positive.

3 Q Now, do you recall what was on television that
4 day?

5 A I don't recall.

6 Q Do you recall what the weather was like that
7 day, was it raining?

8 A I believe it was raining, yes.

9 Q And do you recall what this person was wearing
10 when he entered Bob's Towing?

11 A I believe a black and red jacket -- checkered
12 jacket and like a hat -- a dark hat.

13 Q Was this an overcoat type jacket?

14 A Three-quarter length or something -- a little
15 past his waist.

16 Q And you are certain that he had -- what was
17 the other color, red?

18 A Yes.

19 Q Black and red jacket?

20 A Yes.

21 Q And it was only three-quarter length?

22 A Yes.

23 Q You are absolutely certain --

24 MR. LEVIN-EPSTEIN: Your Honor --

25 Q -- you are absolutely certain that there were

7 Schmeltz-cross

only two of you there that date?

A Yes.

Q What time was this?

A Around 5 o'clock, little before I guess.

Q Are you absolutely sure it was around 5 o'clock
-- couldn't have been around 1 o'clock, could it have been?

A No.

Q You are absolutely certain of that?

A Yes, I am definitely positive on that.

QA All right.

Now, for how long were you engaged in conversation with the person?

A Approximately five minutes -- just to fill out the authorization.

Q And you were looking at the items that you were writing on at that time?

A Yes.

Q Did this person ever sit down?

A No.

Q You were sitting down, weren't you?

A Yes.

Q Were you listening to television?

A Yes.

Q Did you ever stand up?

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1 12 Schmeltz-cross

2 5 o'clock in the evening?

3 A Yes.

4 Q And you are absolutely certain that there were
5 only two of you in the office that day?

6 A Yes.

7 Q You would have no doubt as to any of those
8 answers?

9 A No.

10 Q What is the normal procedure when somebody
11 comes to tow a truck or have a truck towed?

12 Well, in this case for instance was the man
13 going to meet the truck driver somewhere?

14 A Yes.

15 Q Where was he going to meet him?

16 A Where he dropped it.

17 Q What arrangements were made as to how they were
18 going to meet each other?

19 A When he got to the place he would be there -- he
20 said he would be waiting.

21 Q Well, you said this was at 5 o'clock?

22 A Yes.

23 Q Did you have a lot of work that night -- was
24 the office busy?

25 A A couple of jobs there, yes.

11

Schmeltz-cross

A Yes.

Q One of those pictures was Charles Messina; is that correct?

A Yes.

Q Did you take a good look at that picture?

A Yes.

Q You identified that picture as being the person that was at the towing service?

A Yes.

Q And then there came a time when you went to a line-up, right?

A Yes.

Q You picked out the same person that was in the picture; is that correct?

A I picked out the same person who, you know, who was in and in the picture.

Q Were you certain that the person that you picked out -- were you absolutely certain that the person that you picked out was the person that was in the towing service?

A As sure as I can be, yes.

Q And are you certain the person was wearing a red and black coat?

A Yes.

Q You are absolutely certain that the time was

212

1 16 Schmeltz-cross

2 A No.

3 Q You are certain of that?

4 A Yes.

5 Q As the color of the coat?

6 A Yes.

7 Q You are certain of that as you are it was Mr.

8 Messina?

9 A Yes.

10 MS. SELTZER: Could I have one moment, please?

11 THE COURT: Yes.

12 MS. SELTZER: No further questions.

13 THE COURT: Any redirect?

14 MR. LEVIN-EPSTEIN: None at all, your Honor.

15 THE COURT: Thank you, sir.

16 Call your next witness.

17 MR. LEVIN-EPSTEIN: The government calls

18 Kenneth Maggioni (phonetic).

19 (Continued on next page.)

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7 Mantione-direct
on this truck, if you recall?

A I think it was somewhere around 9 or so.

Q In the evening?

A Yes, the evening.

Q And then you towed the truck; is that correct?

A Right.

Q And after having found your way out of
Kennedy Airport, where did you take the truck?

A Washington Avenue.

Q Were you given any instructions on what to do
with the truck once you arrived at the designated destination?

A What I was given was Washington Avenue, between
two streets. I don't remember the streets, but they said it
was a Sun gas station.

When I got there, found the two streets, and
of course Washington Avenue, but it wasn't a Sun gas station.
It was an American.

I got on my dispatcher -- on the radio -- and
called the dispatcher, and at the time I was calling in the
dispatcher to verify that it was an American gas station and
not something else, the gentleman in question came over to
me and said a Negro said this -- this is the place to drop
the truck.

Q You say "the gentleman in question." Do you

Mantione-cross

235

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2 Q Now, you say this person -- well, you say --
3 this area was well lit; right?

4 A Right.

5 Q You didn't have any problem in seeing this
6 person; did you?

7 A No.

8 Q Well, would you describe what he looked like.

9 A I don't -- it's hard -- well, let me describe.
10 At the time I said to the police officer --

11 Q What did you tell the agents?

12 A O.K. I said it was a gentleman that was shorter
13 than I. I am 6'1". Shorter than I. Had salt and pepper
14 hair, I guess you'd call it. Because it's gray and black.
15 It seemed bushy at the time. You know, neat but full of hair.
16 And basically stocky build at the time and I -- he was
17 wearing a type of shirt at the time I believe was a light
18 blue or -- like a work shirt.

19 When I say a "work shirt," something that was heavy,
20 more or less you could wear a jacket, something like this.
21 It had two pockets on it. I couldn't describe any pants or
22 anything else.

23 Q Was he wearing a hat?

24 A At the time I saw the gentleman, no.

25 Q Is that the description you gave to the agents?

Mantione-cross

236

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2 A I believe it was the description. Like I say,
3 it's been a while.

4 Q There came a time that you discovered that the
5 truck was a stolen truck; right?

6 A Right.

7 Q And did there come a time when you identified
8 a picture?

9 A Yes.

10 Q And that was a picture of Charles Messina, right?

11 A Correct.

12 Q And then the agents asked you, is it correct,
13 that would you like to come down, pick him out at a line-up;
14 is that correct?

15 A I don't think it was that way. They just said
16 would you like to come down and -- I think actually the way
17 it was said, they showed me a picture and I says well --

18 Q No. Just answer the question. Did they --

19 A I was asked to come down and look at a line-up.

20 Q Right.

21 Now -- oh, one further question.

22 When you had given the description of the person to
23 the agents, you know, you told them it was a blue jacket;
24 right?

25 A I believe at the time it was blue, you know.

Mantione-cross

243

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2 correct?

3 A I don't know how many men, but there was a line-
4 up of men.

5 Q And if you recall, is this an accurate picture
6 of the line-up?

7 A Yes.

8 Q And do you recall -- was this the line-up as it
9 appeared to you on that day?

10 A Looking at the photograph, I believe it was.
11 I don't know if the men were all exactly in that row.

12 Q As you recall it, is that -- do you recall that
13 that is an accurate representation of the line-up?

14 A I believe so. I mean, I wasn't looking for the
15 other men. I was looking -- going to this photograph, No. 3
16 (indicating).

17 MS. SELTZER: Your Honor, I would request at
18 this time they be marked as evidence and request
19 that Mr. Levin-Epstein stipulate that this is in
20 fact an accurate representation of the line-up.

21 MR. LEVIN-EPSTEIN: More than happy to, your
22 Honor.

23 MS. SELTZER: Thank you.

24 THE COURT: Mark it.

25 THE CLERK: So marked.

Mantione-cross

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Q Well, you say in the afternoon he was there?

A Yes -- in other words, the shifts run eight to ten hours.

Q A dispatcher by the name of Jack worked on Sunday?

A Yes.

Q On that Sunday?

A Yes.

Q You don't know how many people were in the office that day, do you?

A When I came back to the office to exchange trucks and got the information, it was Robbie and Bobby and myself, from what I remember.

Q There was also a fellow, Jack, there?

A Previous, yes.

Q You say that you are sure that the person that was at the American station that night was Charles Messina?

A Again, I have to clarify the fact that he had bushier hair.

Q Do you remember, of your own memory, that this is the man?

A Yes.

Q You are certain?

A Yes.

Mantione-cross

249

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2 Q And you are certain he had a light blue jacket
3 on?

4 A I said, a blue type of work shirt.

5 Q There was a guy named Jack who dispatched that
6 night?

7 A Not that night, but in the afternoon.

8 When I came back to exchange the truck, Robbie
9 and Bobby were in the office.

10 Q You are certain that the person was of Italian
11 origin?

12 A He could be of any origin. The gentleman there
13 could be Jewish. To my eyes, the gentleman looked -- what do
14 you want from me?

15 Q In your eyes, the people on the right, -- the
16 two right people in that picture also are of Italian origin?

17 A I am going from people that I think are Italian
18 -- of Italian descent.

19 Q You are absolutely positive about all of this?

20 A It's all the truth.

21 Q I am not asking if you are lying. I am asking
22 you if you are sure, what you're saying is correct?

23 A Yes.

24 Q And you are absolutely sure of all that?

25 A As far as all my procedure and everything.

Maiole-direct

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Q Could you describe how that happened?

A On the date of the arrest.

Q What arrest are you speaking of?

A The date of the arrest of the defendant seated
in the courtroom.

MR. LEVIN-EPSTEIN: Indicating Charles Messina.

Q What happened on that day?

A On the day of the arrest, he was arraigned
here in Federal court.

Myself and two Federal agents and my partner
took him back home and I went upstairs to his apartment and
he gave me the two sweaters.

Q When you went into his apartment, were you
there with a search warrant?

A No.

Q Were you there with an invitation?

A Yes, I was.

Q Was Mr. Messina present with you in the
apartment?

A Mrs. Messina?

Q Mr. Messina.

A Yes.

Q He was with you?

A Yes.

Maiole-direct

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2 Q What happened when you got to the house -- could
3 you describe it to the Court?

4 A He offered me a drink. I had a small shot of
5 whiskey. He gave me the two sweaters, and his wife was
6 present.

7 Q Was there any conversation between the two
8 of you?

9 A Yes, that he had a few more that he had gave
10 away, and there were some other sweaters, that he was trying
11 to sell to someone.

12 Q Anything further?

13 A He wasn't involved in the actual hijacking of
14 the load, but that he was trying to sell the sweaters for
15 someone.

16 MR. LEVIN-EPSTEIN: No further questions.

17 MS. SELTZER: I am going to at this point direct
18 my attention not to the suppression of the statement,
19 but the suppression of these sweaters, there being
20 no indication that they have anything to do with this
21 case. I have two sweaters at home that look like
22 that. I do not know if the government is planning to
23 offer these sweaters as coming from the load that
24 was hijacked. If that is what they are doing or
25 attempting to, I think it would be appropriate for

Maiole-direct

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2 them to place a foundation; otherwise, it has nothing
3 to do with the case. I could bring in my sweaters --

4 MR. LEVIN-EPSTEIN: If Ms. Seltzer is offering
5 her sweaters to be examined, the government would be
6 happy to examine them.

7 The government would offer these sweaters at
8 the appropriate time in evidence. I would like to
9 be able to use them for identification, to lay the
10 foundation.

11 THE COURT: Who is going to testify that these
12 are part of the load?

13 MR. LEVIN-EPSTEIN: A man by the name of Bernard
14 Ruderman from Sue Bee Fashions (phonetic) will lay
15 the proper foundation.

16 MS. SELTZER: I would request that
17 Mr. Levin-Epstein and I would suggest that he is
18 doing things in reverse order. Once the sweaters
19 are in evidence and once they are in evidence as
20 having been found in Mr. Messina's apartment, or
21 having been given by Mr. Messina, the images are
22 in the jury's mind, that these sweaters are in fact
23 from the load.

24 I think from my understanding of the facts,
25 I cannot see how Mr. Levin-Epstein is going to show

Maiole-direct

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that the sweaters came from the hijacked truck.

THE COURT: What is this man going to testify to?

MR. LEVIN-EPSTEIN: Which man?

MS. SELTZER: May I make a statement?

THE COURT: Excuse me. It is best that I hear from one at a time. I have directed my attention now to the prosecutor.

MR. LEVIN-EPSTEIN: Yes, your Honor.

THE COURT: Mr. --

MR. LEVIN-EPSTEIN: Mr. Ruderman?

THE COURT: Yes.

MR. LEVIN-EPSTEIN: He is the sales manager for Sue Bee Fashions and he is familiar with all their shipments and merchandise. He was familiar with the load in question, or what the load would be, if it was ever received. He will testify they were never received.

He will further testify that these two sweaters, I believe I am quoting him now, are an exact match to the sweaters that were in the load. He will further testify that he can state with approximately 90 percent surety or assurance that these sweaters did come from that load.

THE COURT: That will be sufficient.

Maiole-direct

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2 MS.SELTZER: Your Honor, from my observations of
3 these sweaters, they have absolutely no markings on
4 them at all, except for labels, which do not indicate
5 any kind of load or shipment or any kind of size.

6 They look like sweaters that could be purchased
7 at any department store at any time, and unless
8 Mr. Levin-Epstein is prepared to show that for some
9 reason we are able to see that these sweaters came
10 from that shipment, I just think they are purely
11 prejudicial and they are irrelevant to this case.
12 There are no markings on these sweaters.

13 THE COURT: I will permit the government to
14 receive them.

15 However, you have not established to my satis-
16 faction that there was any consent to a search of this
17 man's house.

18 MR. LEVIN-EPSTEIN: I will proceed on that.

19 THE COURT: You had better.

20 (continued on following page)
21
22
23
24
25

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HIS/elc

Maiole-direct

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Q DetectiveMaiole --

A Yes, sir.

Q -- prior to -- you testified a moment ago, I am sorry, that you went out to Mr. Messina's home with him after his arraignment here in Federal District Court, or before the magistrate?

A Yes.

Q You have a conversation with him prior to--

THE COURT: Was he arrested?

MR. LEVIN-EPSTEIN: Yes, your Honor.

THE COURT: Was he released on bail? How was he released?

THE WITNESS: There was a -- bail was set, your Honor.

THE COURT: Did he have an attorney?

THE WITNESS: I think he was assigned Legal Aid that day.

MR. LEVIN-EPSTEIN: If I might inform the Court--

THE COURT: I find it very strange that after a man is arraigned and assigned an attorney, that a detective accompanies him home. I want to know what the circumstances are.

MR. LEVIN-EPSTEIN: I will try and bring that out.

Maiole-direct

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THE COURT: I wish you would, please.

THE WITNESS: I could explain that, your Honor,
if you want.

THE COURT: I would like the counsel to proceed.

BY MR. LEVIN-EPSTEIN:

Q Were you present when Mr. Messina was
arrested?

A Yes, I was.

Q Who made the actual arrest?

A The FBI agent.

Q Do you see him in the courtroom?

A Yes.

Q Will you point him out?

A Yes. (Indicating)

MR. LEVIN-EPSTEIN: Let the record indicate
Mr. Jules.

BY MR. LEVIN-EPSTEIN:

Q When Mr. Messina was directed by Special
Agent Jules, was he advised of his constitutional rights?

A Yes, more than once.

Q In your presence?

A Yes.

Q Did he respond to that advice of rights?

A Yes.

Maiole-direct

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A Yes.

Q How did he respond?

A That he knew of his rights.

Q After Mr. Messina had been advised of his rights, was there also included in the advice of rights, that he had the right to an attorney?

A Yes.

Q Was he advised that he had a right to be free of any interview, or interrogation, without that attorney's presence?

A Yes.

Q Did you ask him, or rather, in your presence, did Mr. Jules then ask him whether or not he wished to speak with you?

A Yes, he did.

Q What did he say --

THE COURT: This is after he was arraigned?

MR. LEVIN-EPSTEIN: No, no, this is right at the moment of arrest.

THE COURT: Go ahead.

BY MR. LEVIN-EPSTEIN:

Q What did he say?

A He said, "Yes," and I spoke to the defendant.

Q He said he would speak to you?

Maiole-direct

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A Yes.

Q What did you say to him in respect of -- withdrawn.

What did he say to you in respect of the case that you were investigating?

A At first in the house he denied knowledge of the load, and as his wife appeared, a few seconds later or a few minutes later, and she wanted to know what was happening, he said, "It's okay. It involved the sweaters."

Q He said that?

A Yes.

Q Go on?

A We had another conversation. He wanted to get dressed. I went with him while he went to get dressed, and I think we left --

Q It is not at that point that he gave the sweaters to you?

A Oh, no.

Q From there, where did you go?

A To this Court -- this building.

Q When you arrived at this building, where did you go in this building?

A He was arraigned somewhere downstairs.

MR. LEVIN-EPSTEIN: The Magistrate, your Honor.

Maiole-direct

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Q Were you present at the arraignment?

A Yes.

Q You know which United States Attorney handled the arraignment?

A No, I don't remember -- by sight, but not by name. If I saw him, I would know him, but not by name.

Q During the course of the arraignment, Detective Maiola, was Mr. Messina represented by counsel physically present at the arraignment?

A Yes.

Q Was the counsel appointed by -

A The Court.

Q By the Court?

A Yes, he was.

Q Following the arraignment, did you have occasion to speak with Mr. Messina again?

A Yes, before the arraignment and after the arraignment.

Q You were aware that he had been assigned counsel?

A Yes.

Q Did Mr. Messina indicate to you that he did not desire to talk to you?

A No, no, he spoke to me. He told me he wasn't

Ma'olo-direct

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feeling well -- a problem about him getting home. I offered to take him home -- myself, the two FBI agents, and my partner.

Q Was it your idea to drive him home?

A Probably was.

Q Did he approach you and tell you anything--

MS. SELTZER: Objection. I believe Mr. Levin-Epstein is leading the witness.

MR. LEVIN-EPSTEIN: I will rephrase the question.

BY MR. LEVIN-EPSTEIN:

Q During the course of these conversations, what subjects did you talk about -- what did you talk about?

A The shipment in question -- the load.

Q What did Mr. Messina say?

A That he knew nothing about who actually hijacked the load.

Q Did he say anything about any sweaters?

A He mentioned the sweaters -- all he said, he was trying to peddle the sweaters for someone.

Q Did you ask him if he had any sweaters?

A Yes, I did.

Q What did he say?

A He said that he had two left, a blue and a white one.

Maiole-direct

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I asked him where they were, and he said, "in his house."

Q Then what did he say?

A He said, "If you want them, I will give them to you."

MR. LEVIN-EPSTEIN: Your Honor, I believe that is sufficient to show consent -- "If you want them, I will give them to you."

THE COURT: I have serious doubts about whether it is sufficient after counsel has been appointed, and whether you needn't tell the defendant very specifically and inform counsel. I find this is very strange procedure, to take a man from the magistrate's arraignment without a search warrant and without informing counsel. Counsel was right there.

MR. LEVIN-EPSTEIN: Your Honor, if I would be permitted to continue with the witness -

THE COURT: I think I have the essential facts.

MR. LEVIN-EPSTEIN: I think you do.

THE COURT: You had better get some cases. I do not think it is a healthy procedure, myself. That is what counsel is there for, to advise him.

Counsel will brief the matter. Until the matter is thoroughly briefed, I will not admit this evidence.

Ma iolo-direct

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MR. LEVIN-EPSTEIN: May I continue with a few more questions, and perhaps it will clear it up for you?

THE COURT: You may.

BY MR. LEVIN-EPSTEIN:

Q Detective Maiolo, prior to the arraignment, did there come a time when you met with me in my office?

A Yes.

Q Who else was present?

A My partner, Frank Jules, and another FBI agent, and also the defendant.

THE COURT: The defendant or his lawyer?

THE WITNESS: The defendant.

THE COURT: This is after the appointment of counsel?

MR. LEVIN-EPSTEIN: Prior to the appointment of counsel.

THE COURT: Yes.

BY MR. LEVIN-EPSTEIN:

Q Do you recall whether or not at that time Mr. Messina was again advised of his rights?

A Yes.

Q Who advised him of his rights at that time?

A You did.

Maiole-direct

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Q Did I advise him that he had the right to remain silent?

A Yes.

Q Did I advise him that he had a right again to an attorney?

A Yes, you did.

Q Did I advise him that he did not have to talk with me or anyone else unless there was an attorney present?

A Yes.

Q What did he say in response to this advice of rights?

A He said, "You could ask me questions. I will answer them."

THE COURT: Mr. Levin-Epstein, were you aware that the detectives were taking this man home?

MR. LEVIN-EPSTEIN: At that point, I don't believe the decision was made to take him home.

THE COURT: After your arraignment, were you aware they were taking him home?

MR. LEVIN-EPSTEIN: No.

THE COURT: Were you aware that they were going to search his home?

MR. LEVIN-EPSTEIN: I don't then believe they did search his home, and I wasn't aware that they

Ma'olo-direct

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went with him.

THE COURT: Very well,

Brief it. I do not know what the law in the
Circuit is on it. It doesn't sound right to me.

MR. LEVIN-EPSTEIN: The next witness would have
been Bernard Ruderman.

THE COURT: I want counsel for the defendant to
submit a brief, too.

MR. LEVIN-EPSTEIN: I ask for the Court's
guidance as to Mr. Ruderman testifying that these
sweaters match those in the load?

THE COURT: It is no good unless we match them
in both sides.

MR. LEVIN-EPSTEIN: I am thinking in terms of
expedition, if we could bring that in subject to
connection.

THE COURT: There is no point to it. You had
better brief it.

MS. SELTZER: I would also request that the
sweaters be taken away from counsel table.

THE COURT: Yes.

MS. SELTZER: Perhaps they could be put behind
the desk there.

MR. LEVIN-EPSTEIN: I will make sure that the

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2 jury does not see them, your Honor.

3 MS. SELTZER: Excuse me, your Honor. When do you
4 want the brief?

5 THE COURT: The earliest possible moment.

6 MR. CHREIN: Could it be submitted informally
7 without being typed?

8 THE COURT: Yes, if it is written out, I will
9 take it.

10 (Jury present)

11 MR. LEVIN-EPSTEIN: Would you take the stand,
12 please, sir?

13 (continued on following page)
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Jules - direct

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FRANCIS R. JULES, called

as a witness herein, having been first duly sworn
by the Clerk of the Court, was examined and testified
as follows:

DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q For the record, Agent Jules, are you employed?

A Yes.

Q By whom?

A Special Agent, Federal Bureau of Investigation.

Q How long have you been so employed?

A Twenty-three years.

Q Special Agent Jules, I direct your attention
to December 18 of 1973 and I ask you on that date did you
have occasion to make an arrest?

A Yes.

Q Can you describe the circumstances of that
arrest and the events following that arrest for the Court?

A Yes. On December 18, I went to the residence
of Charles Messina, where I placed him under arrest. I, at
this time, advised him of his rights and what the charges
were. We then went to the New York Office of the FBI,
for processing.

There at the New York Office of the FBI, I

Jules - direct

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again advised him of his rights and Mr. Messina signed the
Waiver of Rights form.

Q Special Agent --

MR. LEVIN-EPSTEIN: May this be marked for
Government's next in sequence for identification?

THE COURT: Yes.

THE CLERK: Government's 6 for identification.

(So marked.)

BY MR. LEVIN-EPSTEIN:

Q Agent Jules, I show you Government Exhibit 6
for identification and I ask you do you recognize it?

A Yes.

Q Can you describe to the Court what it is?

A Yes.

It's an Advice -- Advice of Rights form that
we have in the Federal Bureau of Investigation. Signed
by Charles Messina and witnessed by myself.

Q Was this signed in your presence?

A Yes.

MR. LEVIN-EPSTEIN: Your Honor, may this be
offered in evidence?

MISS SELTZER: I have no objection.

THE COURT: Received.

THE CLERK: Your Honor, can it be deemed in

Julius - direct

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evidence?

THE COURT: Deemed in evidence.

(So marked.)

BY MR. LEVIN-EPSTEIN:

Q Go on with your testimony, Agent Jules.

A Right.

From the New York Office of the FBI, we proceeded to the Eastern District of New York, for arraignment. And with me was Detective McKenna and Detective Maiolo of the Port Authority Police Department.

THE COURT: He was arrested what, on an indictment?

THE WITNESS: Pardon me? On a complaint.

THE COURT: On a complaint?

THE WITNESS: A complaint, yes.

THE COURT: There was no arrest warrant?

THE WITNESS: Yes.

THE COURT: There was a warrant?

THE WITNESS: Yes.

We then -- we went to the Eastern District of New York and while awaiting arraignment, we were upstairs in an office next to Mr. Levin-Epstein's Office. That was the defendant, myself and the two detectives that I mentioned.

Jules - direct

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Messina stated he wasn't feeling well and then he said, "Listen, I had nothing to do with this hijack load, but I want to cooperate and I had been peddling some sweaters. I have some of these sweaters. I had five of them."

And he stated that he got these sweaters from a person he knew as Vinnie, at a social club on Avenue D in Brooklyn, where Mr. Messina stated he used to go and play cards.

He recalled that he was down at the social club, Vinnie told him to go to his automobile, that's Vinnie's automobile, and take out some sample sweaters. And Mr. Messina stated that he had two of these sweaters at his house.

After further general talk and conversation, Mr. Messina stated, "If you want these sweaters, you can have them." He then stated that he wasn't feeling good and he complained during the arraignment that he wasn't feeling good.

BY MR. LEVIN-EPSTEIN:

Q Now, Agent Jules, after the conversation that you have just testified to, --

A Yes.

Q -- where you say that Mr. Messina said to you,

Jules - direct

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"If you want them you can have them," --

A Yes.

Q -- did there come a time when you escorted Mr. Messina downstairs from my office to the Magistrate's court?

A Yes.

Q When you arrived at the Magistrate's court, did Mr. Messina indicate to you one way or another whether he was represented by counsel?

A He said he was going to request Legal Aid.

Q All right.

Were you present at the arraignment?

A Yes.

Q Was Legal Aid appointed as counsel for the defendant at the arraignment?

A Yes.

Q Do you recall which lawyer from the Legal Aid Society represented Mr. Messina?

A I don't know his name. He had glasses. I've seen him around but I -- frankly I don't remember his name.

Q All right.

Did there come a time prior to the arraignment where the lawyer from the Legal Aid Society consulted in private with Mr. Messina?

1 Jules - direct

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2 A Yes.

3 Q Go on.

4 A So in the course of this conversation, when he
5 was telling about these sweaters, he stated that he didn't
6 want to cause any excitement at home and would we drop him
7 off on the way back to the airport and I said that we would.

8 So after the arraignment, we left, he had
9 to be processed by the marshals. And then we left the
10 Marshal's office. We got in the -- in the Bureau car and
11 we drove Messina to his home in Brooklyn.

12 Q Agent Jules, prior to leaving the building, in
13 fact, directly after the arraignment--by the way, was
14 Mr. Messina released on a personal recognizance bond at the
15 arraignment?

16 Well, was he released?

17 A He was released. I forget what the bond was
18 set at.

19 Q When you say processed by the marshals, were
20 you taking him downstairs to the marshals so they could
21 complete their clerical work?

22 A Fingerprint, yes.

23 Q Upon leaving the Magistrate's court, escorting
24 Mr. Messina --

25 A Yes.

Jules - direct]

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Q -- did you have occasion to meet anyone?

3

4

5

6

A Oh. I saw the Legal Aid attorney whose name I don't recall. And I nodded to him and I said, "Don't worry about him. I'm going to drop him off at home because he wasn't feeling well."

7

8

Q This was upon Mr. Messina's request, was it not?

9

10

11

A Yes. Give him a ride.

Q Did the Legal Aid attorney respond to that in any way?

12

13

14

A No.

Q Did he say, "I don't want you going home with the FBI"?

15

16

17

A No.

Q Did he say to you that he did not want you to consult or confer with his client without him being present?

18

19

20

Q Did he, in your presence, did he say anything to his client at that time?

21

22

23

24

A Not that I know of.

Q Of course, you were not privy to the private consultation between counsel and the defendant prior to the arraignment?

25

A No.

Q Go on.

1
2 A Then we arrived at the home of Mr. Messina. I
3 remained in the car and Det. Maiola went upstairs and was given
4 the sweaters and came out and we proceeded back to Kennedy
5 Airport.

6 Q Agent Jules, did you ever specifically request
7 that he turn the sweaters over to you?

8 A I didn't, no.

9 Q Did anybody in your presence?

10 A No.

11 Q Was there ever -- withdrawn.

12 Did you ever threaten the defendant?

13 A Threaten him?

14 Q Yes.

15 A No.

16 Q Did you ever promise him that things would go
17 easier for him if he cooperated?

18 A No. I said I couldn't make any promises.

19 Q Did you ever tell him that you could do some-
20 thing for his case or not based upon his cooperation or lack
21 thereof?

22 A No. I said if he cooperated I would just
23 bring it to the attention of the U. S. Attorney.

24 Q All right.

25 But according to your testimony then it was

Jules - ddirect

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Mr. Messina's voluntary surrender of these sweaters that resulted in you getting them?

A Yes.

MR. LEVIN-EPSTEIN: No further questions, your Honor.

THE COURT: Could you tell us what happened at home, precisely, from the time you pulled up?

THE WITNESS: I didn't go upstairs. Mr. Messina and Det. Maiola were talking about Italy and where who came from and what. So when we arrived I parked the car, Det. Maiola got out, went upstairs and he was gone say, two minutes and he came down with the sweaters.

He got in the car and we went back to the airport.

BY MR. LEVIN-EPSTEIN:

O But you did not go upstairs with them?

A No, I didn't.

O You remained in the car.

MR. LEVIN-EPSTEIN: No further questions, your Honor.

MISS SELTZER: May I inquire, your Honor?

THE COURT: Yes.

CROSS-EXAMINATION

BY MISS SELTZER:

Q Agent Jules, was it in the U. S. Attorneys office prior to the arraignment that Mr. Messina asked you or told you or there was a discussion about driving him home, prior to the arraignment.

A Prior to the arraignment.

Q Now, during the course of the arraignment, during the course of the time that you came down from the U. S. Attorney's office, did you at any time have any conversation at all with Mr. Kelly?

A No. Except that --

Q Did you ever identify yourself to Mr. Kelly?

A I don't think I did, no.

Q Well, was there any indication to you that Mr. Kelly in fact knew who you were?

A Well, I had been around here a long time. I was at an arraignment with a Federal prisoner so I assume someone knew I was an FBI agent.

Q But to your own knowledge, you had not had any conversation with Mr. Kelly?

A No.

Q Now, when you made that statement that you say you made to Mr. Kelly, did he respond in any way?

Jules - cross

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1 A I don't recall. He could have nodded, or
2 said nothing.
3

4 Q Well, did he? do you know?

5 A I don't know. I don't remember.

6 Q But you don't remember him saying anything,
7 certainly?

8 A No, I don't.

9 Q So, to your knowledge, he may not even have
10 heard what you thought was a statement to him?

11 A True.

12 Q Now, when you got to Mr. Messina's -- when you
13 were in the -- when you were in the automobile with
14 Mr. Messina, at any time, did you then advise him of his
15 rights? Did you at any time tell him that he had a right
16 to remain silent and the other Miranda warnings?

17 A At what time is this now?

18 Q After the arraignment.

19 A No. I had advised him already in the office
20 and he signed the waiver.

21 Q You advised him at 10:30 in the morning; is that
22 correct?

23 A In the New York office, yes.

24 Q That is right.

25 How many hours before was that?

Jules - cross

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1
2 A I don't know. I forget what time the arraign-
3 ment was. It was in the afternoon, the arraignment, though.

4 Q Well, was it 2:00?

5 A That must have been 2:00 o'clock arraignment.

6 Q And the rights form was signed at 10:00 a.m.
7 in the FBI Headquarters; is that right?

8 A Yes.

9 Q Now, what did you say to Mr. Messina during
10 the course of that automobile ride? What words came from
11 your mouth?

12 You asked him questions, right? Or did you ask
13 him questions?

14 A General conversation.

15 Q Well, what was the general conversation about?
16 In addition to Italy. Was it about the case?

17 A I could have been asking him questions about
18 the sweaters which he had volunteered to me. I didn't know
19 anything about sweaters until he told me he had them.

20 Q Now, were you in charge of this whole case?

21 A Yes.

22 Q Were you the agent in charge that day?

23 A Yes.

24 Q Why is it that you had Mr. -- what is it --
25 Maiola go upstairs instead of you going upstairs yourself?

Jules - cross

307

Isn't it customary that you take care of what you thought was important business, yourself?

A Because Mr. Maiola felt that he was having a rather personal conversation with Mr. Messina about Italy. We didn't want two agents to go up and I asked Det. Maiola "Do you mind going up and getting the sweaters," because we didn't want his wife to get excited or anything else.

MISS SELTZER: Could I have one moment, your Honor?

I have no further questions, your Honor.

MR. LEVIN EPSTEIN: Just one question, your Honor.

REDIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q Mr. Jules, Agent Jules, I'm sorry, when you were taking Mr. Messina down to the marshal's area for his processing out of the building --

A Yes.

Q -- is that when you met Mr. Kelly? I'm sorry. Is that when you met the lawyer that represented Messina?

A Yes.

THE COURT: There is a lawyer sitting at the counsel table.

Is that the man?

Jules - redirect

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A I -- I think it's him but -- yes, I think it is.

THE COURT: All right.

That's Mr. Kelly of the Legal Aid.

THE WITNESS: Right.

THE COURT: Legal Aid Society.

MR. KELLY: Did you want me to leave the court-
room, your Honor?

THE COURT: No.

BY MR. LEVIN-EPSTEIN:

Q Is that when you met Mr. Kelly?

A When I was leaving the Magistrate's to go
out to go to the marshals?

Q Right.

A I think -- just standing by the door.

Q When you met Mr. Kelly, was Mr. Messina present
as well?

A Yes. We were going with him downstairs.

Q Did Mr. Messina have the opportunity -- with-
drawn.

Did Mr. Messina know that you were an FBI
Agent at that time?

A Mr. Messina?

Q Yes.

A Certainly.

1
2 Q You had just arrested him?

3 A Yes.

4 Q Is it fair to say that Mr. Messina had the
5 opportunity to tell Mr. Kelly anything he wanted to tell him
6 at that point?

7 A Yes, I would think so.

8 MR. LEVIN-EPSTEIN: No further question, your
9 Honor.

10 THE COURT: All right. Step down, sir.

11 MR. Chrein, take the stand, please.

12 (continued next page.)

HS flws. 13

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Chrein - direct

THE COURT: Mr. Chrein, take the stand, please.

S I M O N C H R E I N , having been first duly Sworn by
the Clerk of the Court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Simon Chrein.

THE COURT: Are you in charge of the Legal Aid
Services in this court house?

THE WITNESS: I am.

THE COURT: What's the practice with respect to
Legal Aid Attorneys at the arraignment, do they inform
their clients with respect to consultations with others?

THE WITNESS: Unless -- As a general rule, unless
we make a specific arrangement with the Office of the
United States Attorney for the defendant to cooperate
in return for some consideration or whatever, it is our
usual practice to advise the defendant to make no state-
ments to any law enforcement agents, though we often --
I can't say invariably -- advise the law enforcement
agents to have no contact with our defendant.

THE COURT: You advise the defendant not to have
any contact?

THE WITNESS: That is our usual practice, your
Honor.

THE COURT: You advise the defendant not to give

HS:GA

T2R1 PM2

Chrein - direct

statements to law enforcement officials?

THE WITNESS: That is the case, unless we make a specific arrangement for cooperation.

THE COURT: You advise the defendant not to allow law enforcement officials to visit their homes and take evidence?

THE WITNESS: We would not make necessarily specific remarks along those lines, but that, in my opinion, would be covered by our advice not to discuss this case with anyone other than counsel.

THE COURT: So far as you know, was Mr. Kelly aware of those instructions and that practice?

THE WITNESS: I am certain that he was, yes, sir.

THE COURT: All right, the Court is going to assume that this defendant was so instructed, under the attorney-client privilege. I won't call Mr. Kelly.

Of course, the defendant is free to do so.

Any cross-examination of this witness?

MR. LEVIN-EPSTEIN: No, your Honor.

THE COURT: Do you have any?

MR. SELTZER: No, your Honor.

THE COURT: Thank you. You may step down.

MR. LEVIN-EPSTEIN: The next witness, your Honor--

THE COURT: Let me see what they want to do with

1 Mr. Kelly.

2 MR. CHREIN: May I be permitted, in view of the
3 fact that the jury is not present, to examine Mr. Kelly?

4 THE COURT: The defendant is waiving his client-
5 attorney privilege?

6 MR. CHREIN: Yes, your Honor.

7 E D W A R D J . K E L L Y , having been first duly Sworn
8 by the Clerk of the Court, testified as follows:

9 THE CLERK: State your full name, please.

10 THE WITNESS: Edward J. Kelly, 26 Court Street,
11 Brooklyn, New York, 11201.

12 VOIR DIRE EXAMINATION

13 BY MR. CHREIN:

14 Q Mr. Kelly, you are an associate attorney with
15 the Federal Defendants' Services Unit of the Legal Aid Society?

16 A Yes.

17 Q Were you so employed on December 8th, of 1973--
18 December 18th of 1973?

19 A Yes.

20 Q Now, sir, you have heard my testimony connected
21 with this, immediately prior to yours?

22 A Yes.

23 Q Have I accurately stated the procedure followed
24 in connection with advice to defendants concerning statements
25 to Law Enforcement Agents?

⁴
EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION
RE: SWEATERS

Kelly - voir dire/Chrein

1
2 A Yes.

3 Q How long have you been employed by the Legal Aid
4 Society?

5 A December 13th of 1965.

6 Q Have you any independent recollection of repre-
7 senting the defendant Charles Messina in connection with a
8 Magistrate's arraignment on December 18, 1973?

9 A No, I have no independent recollection. I
10 realize now from looking at the file, and also from a picture
11 of Mr. Messina that I saw some days ago, that I had some con-
12 tact with Mr. Messina at his arraignment.

13 Q Have you reviewed the notes that you made at that
14 arraignment?

15 A Yes.

16 Q Or in connection with your conversation with the
17 defendant?

18 A I just now personally looked over the notes that
19 I made.

20 Q Can you tell me, Mr. Kelly, whether the defendant
21 Messina admitted the knowing possession of these sweaters that
22 are the subject matter of this case?

23 A No, my recollection is that he denied his complicity
24 in that violation.

25 Q Has that recollection been reinforced by examin-

5 EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION
RE: SWEATERS

Kelly - voir dire/Chrelin

1
2 in your notes, taken on that date?

3 A Yes, I believe Mr. Messina was quite adamant in
4 protesting his innocence.

5 Q Was there any discussion between you and the FBI
6 Agent, or a representative of the United States Attorney's
7 office concerning Mr. Messina cooperating in any way, shape or
8 form?

9 A I have no recollection of that.

10 Q Is there any notation on your file concerning
11 such a conversation?

12 A No, there isn't.

13 Q Now, sir, if a defendant had indicated to you
14 that he was guilty, and if you made some arrangement with the
15 United States Attorney's office concerning cooperation in any
16 way, or form, would you have made -- would it be your normal
17 practice to make a note in connection with your arrangement?

18 A Yes.

19 Q Have you reviewed your arraignment notes?

20 A Yes.

21 Q Is there any such notation?

22 A No, there isn't.

23 MR. CHRELIN: I have no further questions.

24 MR. LEVIN-EPSTEIN: I have no questions of Mr.

25 Kelly.

1 Kelly - voir dire

2 THE COURT: You see the man sitting next to
3 counsel for the Government?

4 THE WITNESS: Yes.

5 THE COURT: Do you recognize him?

6 MR. KELLY: Yes, I recognize him, as I say
7 realize that some time ago, when I saw some pictures of
8 a lineup --

9 THE COURT: No, no, do you recognize Mr. Jules?

10 THE WITNESS: I am sorry. I recognize Mr. Jules.
11 I have seen him on a number of occasions.

12 THE COURT: At the time of the arraignment, did
13 you know that he was an FBI Agent?

14 THE WITNESS: I don't have any recollection that
15 Mr. Jules was the Agent on the case, Judge.

16 THE COURT: Would you have known at the time that
17 he was an FBI Agent?

18 THE WITNESS: Yes, I have seen Mr. Jules on a
19 number of occasions.

20 MR. LEVIN-EPSTEIN: One question, if I might
21 interrupt?

22 THE COURT: You may.

23 MR. LEVIN-EPSTEIN: Mr. Kelly, were you given a
24 Complaint, or is it your usual practice when represent-
25 ing clients, upon assignment, to be given a copy of the

Kelly - voir dire

official Complaint?

A Yes, that's right.

Q What would you do with that copy?

A I would take that copy and I would read it, and I would go over it with the defendant, and get a statement from him with respect to the charge.

MR. LEVIN-EPSTEIN: Is it then placed in a file somewhere?

THE WITNESS: Yes.

MR. LEVIN-EPSTEIN: Is it part of the case file?

THE WITNESS: Yes.

MR. LEVIN-EPSTEIN: Do you recall receiving a Complaint in this case?

THE WITNESS: I have no specific recollection, but I have seen a Complaint in the file, which indicates as was normal I received a Complaint in this case.

MR. LEVIN-EPSTEIN: Is it not a fact, Mr. Kelly, on that Complaint, Francis R. Jules, an Agent of the FBI, is named as the Complainant?

THE WITNESS: I believe I saw that when I looked at the file.

MR. LEVIN-EPSTEIN: No further questions.

THE COURT: Did the Magistrate inform the defendant of his rights?

Kelly - voir dire

THE WITNESS: Normally, the Magistrate doesn't do that. He allows the attorneys to advise the defendant of his rights.

THE COURT: Based on your normal practice, and what recollection you have, and what recollection you have from your records, what did you say to the defendant about his rights?

THE WITNESS: I have no specific recollection of telling the defendant his rights. I just have my normal procedure, what I would follow.

THE COURT: What is that?

THE WITNESS: The normal procedure would be to tell the defendant anything he said may be held against him, whether he says that to a civilian or an enforcement agent, and that he shouldn't ordinarily make any statements without the permission of counsel.

THE COURT: Is that how you put it to him, that he shouldn't ordinarily make any statements?

THE WITNESS: There are situations where a defendant may be cooperating --

THE COURT: What do you say to him exactly?

THE WITNESS: I ordinarily say, You shouldn't make any statement to anyone --

THE COURT: You are talking to me. What would

⁹EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION³¹⁸
RE: SWEATERS

Kelly - voir dire

you say?

THE WITNESS: Mr. Messina, don't make any statement to any civilian or any law enforcement officer, because anything you say may be held against you. You may be putting your foot in it by making a statement, and you shouldn't make any statement without checking with me prior to that.

THE COURT: Thank you.

Call the Detective, please.

MR. LEVIN-EPSTEIN: The Government calls Detective Dominic Maiolo.

D O M I N I C M A I O L O , resumes the stand and testifies further as follows:

VOIR DIRE EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q I direct your attention to December 18, of 1973, and I ask you, were you working on that day, as I asked you earlier?

A Yes, I was.

Q Can you describe whether or not -- Withdrawn.

Can you tell the Court whether or not you took part in an arrest on that date?

A Yes, I did.

Q Who did -- Who was arrested during that arrest?

1 Mainlo - voir dire/Levin-Epstein

2 A The defendant seated right there, Charles Messina.

3 Q Can you describe for the Court -- Did there come
4 a time after Mr. Messina's arraignment when you, with the com-
5 pany of others, traveled to Mr. Messina's residence?

6 A Yes.

7 Q Who was present at that time?

8 A Myself -- I was driving the vehicle -- my partner,
9 Joe McKenna, this FBI Agent, and another FBI Agent and the
10 defendant.

11 MR. LEVIN-EPSTEIN: May the record indicate that
12 one of the FBI Agents is Special Agent Francis Jules.

13 Q Do you recall the name of the other FBI Agent?

14 A No, I don't.

15 Q During the course of this ride by automobile --

16 A Yes, sir.

17 Q -- from where did you go to where?

18 A From this building to the defendant's home.

19 Q During the course of that ride, was there any
20 conversation?

21 A Yes, there was.

22 Q Can you describe for the Court what the substance
23 of what you recall that conversation was?

24 A There was some conversation as to the hijacked
25 load, and as to my nationality and his nationality of being

EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION
RE: SWEATERS

Maiolo - voir dire/Levin-Epstein

Italians, and what part of Italy our families come from.

Q What else happened --

THE COURT: I want to know what was said by whom.

Q Who said what to whom?

A Well, the defendant was asking me if my family was Sicilian, and I stated No, and he was asking me what part of Italy they came from, and I told him, and I asked him what part of Italy he came from, and he told me, and then we spoke about the sweaters, and he wanted to cooperate.

THE COURT: I want to know what was said.

Q What did he actually say to you, Detective Maiolo?

A "Are you Italian?" "Yes, I am Italian." "What part of Italy does your family come from?" And I told him, "Calabreia."

I asked him what part his family came from, and he said, "Sicily." He named the town. I forgot the town.

THE COURT: What else?

THE WITNESS: Also, we spoke about the hijacked load.

THE COURT: What did he say?

THE WITNESS: He said that he wasn't involved with the hijacking of the load -- He said the only way he could be involved was that he was trying to peddle

1 Maiplo - voir dire/Levin-Epstein

2 some sweaters, that someone gave him -- said some sample
3 sweaters that someone gave him. First he stated he met
4 someone by the name of Vinnie in a bar, and this guy
5 asked him how he was doing, and he said he was out of
6 work and needed some money. This fellow told him, "Would
7 you like to make some money peddling some sweaters?"
8 And then he told another story about going to his social
9 club in Brooklyn, where someone approached him -- a
10 friend of his told him that he had part of a shipment --
11 a load of sweaters, and if he would like to peddle them,
12 and he gave him a few samples, and he had two left, and
13 the others he gave to members of his family, and he had
14 two left, a blue one and a white one. He said he was
15 cooperating, and he would give me two of them.

16 We got to his house, we walked up the steps, he
17 offered me a glass of whiskey, gave me a small shot,
18 turned to his wife and said, "Go get the sweaters."

19 She went into the other room, and came back with
20 two sweaters, gave them to the defendant, and he gave
21 them to me.

22 He says, "This is it, and I want to show you I
23 am trying to help." We shook hands. I told him we'd
24 be in touch, and we left.

(continued on next page.)

HS:GA

T2R2 PM2

Q How long were you in the apartment?

A Very short -- a couple of minutes.

Q When you entered the residence of the defendant Charles Messina, did you wander around by yourself?

A I never left that kitchen area when you first walk in.

Q Were you ever left alone while you were in the house?

A No, I was in the house with the defendant.

Q Did you search while you were in the house?

A I touched nothing in the house.

MR. LEVIN-EPSTEIN: I have no further questions, your Honor.

THE COURT: Anything further?

MR. LEVIN-EPSTEIN: May I make a request of the Court, that you instruct the defendant not to threaten me or cast any aspersions on my witnesses between tables here at this moment.

THE COURT: What has happened?

MR. LEVIN-EPSTEIN: A remark was made to me by the defendant, saying, "that he is a lying bastard."

THE DEFENDANT: Your Honor --

MS. SELTZER: Sit down and be quiet.

THE DEFENDANT: If you want me to go to the

1 hospital, I will go to the hospital -- May I speak to
2 you?

3 THE COURT: I would suggest that you listen to
4 your attorney.

5 THE DEFENDANT: I understood that I am being
6 represented by an attorney. Well, I am being rail-
7 roaded here. I know I am. I would like to speak to
8 you, please.

9 MS. SPLITZER: Be quiet.

10 THE DEFENDANT: I did not make that statement.
11 He just hates my guts. I want a doctor right here and
12 now -- I must talk to you alone, or in front of anybody.
13 These people are lying.

14 MS. SPLITZER: Could we have a recess?

15 THE DEFENDANT: I wanted to be on the record,
16 your Honor. I must talk to you. I must talk to you.

17 THE COURT: I suggest that you take a recess and
18 discuss it with counsel.

19 THE DEFENDANT: In front of you and him, if you
20 don't mind, I have to talk to you.

21 THE COURT: I think you ought to discuss it
22 privately with counsel. If you go on record, you waive
23 your right against self-incrimination, and you will be
24 subject to very severe cross-examination.

25 The Court notes --

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1 THE DEFENDANT: I am sorry if I got out of order
2 a little bit.

3 THE COURT: That is all right.

4 The Court notes --

5 THE DEFENDANT: He put words into people's mouths
6 and this isn't right, that's all I know.

7 THE COURT: The Court notes --

8 THE DEFENDANT: That's what he did to me before
9 in his office, before I even saw counsel.

10 THE COURT: The Court notes that the defendant's
11 wife is in the courtroom, and she has shown some per-
12 turbation I think we had better take a recess so the
13 family can pull itself together and we can go on after
14 you make a decision.

15 After we have the cross-examination of this
16 witness, I will hear the other witness in the case,
17 and then we will reach some decision pending whether
18 defense counsel wants to put on any witnesses.

19 Let us take a five minute recess.

20 Everybody collect their wits.

21 (Recess taken.)

22 THE COURT: Are you going to cross-examine the
23 Detective?

24 MS. SELTZER: No, your Honor.

25 THE COURT: All right.

1 Do you have any witness on this hearing?

2 MS. SELTZER: No, your Honor.

3 I would just at this point apologize for the out-
4 burst that occurred prior to the break.

5 THE COURT: That is all right.

6 MS. SELTZER: I do not know what happened.

7 THE COURT: It is irrelevant to my decision.

8 Counsel can supplement their briefs if they
9 would like to, but my understanding of the Second Cir-
10 cuit's position is that this would be admissible. I
11 do not see how you can avoid United States v. Gaynor,
12 472 F. 2d, 399. I find as a matter of fact that the
13 defendant was fully apprised of his rights on a number
14 of occasions before arraignment, that he was fully ad-
15 vised of his rights by Mr. Kelly, that Mr. Kelly spe-
16 cifically warned him not to discuss any matters with
17 any of the law enforcement officials, that Mr. Kelly did
18 see a person known to him as an FBI Agent about to take
19 the defendant to his home, and Mr. Kelly was aware that
20 the defendant would be taken to his home by an FBI Agent,
21 that defendant was fully aware that he should not be
22 talking to any FBI Agent, or Police person, and that he
23 should not allow them to come into his house without
24 first clearing it with counsel, that he ignored the
25 advice of his counsel, and voluntarily waived his rights

1 not to talk, not to permit Police personnel and investi-
2 gatory personnel to enter his house. He did this very
3 deliberately, because he thought that he would be able
4 to place himself in a better position in the prosecu-
5 tion of his case, and that he might be able to gain
6 the sympathy and the protection of the FBI Agents and
7 the Police personnel.

8 There was nothing, however, done by any of the
9 prosecution forces to induce him to make that statement,
10 or to instill that state of mind.

11 The FBI acted with full propriety here, particu-
12 larly since the FBI Agent informed counsel for the
13 defendant what he was going to do. I just do not see
14 how this comes within the Rule of Dorham, 475 F. 2d,
15 208, Seventh Circuit, 1973, at page 211, because I
16 specifically find that counsel for the Government was
17 not at all aware of what happened after the arraignment.
18 This was not a planned matter. It arose purely because
19 of the request and attitude of the defendant.

20 About this Second Circuit case particularly,
21 United States v. Gaynor, 472, F. 2d, 899, a 1973, is
22 almost directly on point, and I note that Judge Oakes
23 was a part of the panel. If he thought that this was
24 admissible, it is hardly likely that any Judge on the
25 Second Circuit would think it was not. I will give

1 counsel more time to brief it, and if you want to intro-
2 duce any more evidence, I will hear it, but it seems
3 like such a straightforward case. I do not know what I
4 can do about it.

5 MS. SELTZER: Your Honor, if I may be heard?

6 My understanding of Gaynor was that the statements were
7 made while the defendant and Agents were in an elevator
8 within this building. That is a different situation,
9 and it put them into a different situation, and gives
10 them a different responsibility than when they agree,
11 or ask if they can drive a defendant home.

12 THE COURT: The defendant asked them to drive
13 him home, and counsel for the defendant specifically
14 approved it, and they were doing a humanitarian service
15 here.

16 MS. SELTZER: I believe there is a misunderstanding
17 ing between the way you interpret Mr. Kelly's testimony
18 and the way I understood he was to testify. In my dis-
19 cussions, he had no knowledge --

20 THE COURT: He had no recollection.

21 MS. SELTZER: Your Honor, there is a statement --

22 THE COURT: I credit completely the FBI Agent,
23 Mr. Jules. I believe that what he said happened, did
24 happen, and Mr. Kelly does not have any recollection.

25 MS. SELTZER: Your Honor --

1 THE COURT: Mr. Kelly is normally a very good
2 lawyer, but I say he either was sloppy in this case,
3 or else the client is uncontrollable. Based on what
4 I saw in the courtroom, it is based on that the client
5 is uncontrollable. It is not Mr. Kelly's fault. You
6 and Mr. Chrein could not even control this client in
7 open court with a Reporter present. I do not see how
8 Mr. Kelly is to be blamed if he couldn't control the
9 man.

10 MS. SELTZER: I honestly don't think that Mr.
11 Kelly ever knew --

12 THE COURT: I do not care what you honestly be-
13 lieve. If you have any information, let us have it.

14 MS. SELTZER: Yes, I do. ;

15 THE COURT: In Sworn testimony, otherwise I will
16 believe what I have heard on the record.

17 MS. SELTZER: Your Honor, our files specifically
18 state --

19 THE COURT: Excuse me, do you have any evidence
20 that you want to introduce? I am not interested in
21 your personal beliefs, in all due respects.

22 MS. SELTZER: Your Honor, I will at this point
23 not introduce any further evidence.

24 THE COURT: Do you want more time to brief it?
25 I will give you overnight.

1 MR. CHREIN: May I be heard on the Gaynor case,
2 applicable to this case, very briefly?

3 THE COURT: Yes.

4 MR. CHREIN: The Gaynor case involved a situa-
5 tion where a defendant without any steering or discus-
6 sion unexpectedly and spontaneously made a statement
7 which the Agents could in no way ward off --

8 THE COURT: I think that is what happened here.
9 They were just taking him home, as good Samaritans,
10 when he continued to talk.

11 MR. CHREIN: I think the evidence is unclear as
12 to whether the conversation was initiated by the Police
13 Officer ---

14 THE COURT: I find on what I heard it was initi-
15 ated by this defendant attempting to exculpate himself.

16 Do you want time to look into the matter further?

17 MR. CHREIN: I do not believe it would be produc-
18 tive at this point, your Honor.

19 THE COURT: All right, this will all be admis-
20 sible, including the statements.

21 Let us hear what the other witness has to say,
22 so I know whether any of this is relevant.

23 MR. LEVIN-EPTSTEIN: We do not intend to offer
24 the statement, merely the evidence.

25 THE COURT: Let's have your other witness.

1
2 MR. LEVIN-EPSTEIN: Your Honor, the foundation
3 for Mr. Rudaman's testimony is Detective Maiolo's testi-
4 mony.

5 THE COURT: I understand that. I want to hear
6 what he is going to say because if he can't connect
7 this --

8 MR. LEVIN-EPSTEIN: I see.

9 THE COURT: -- this Exhibit with the stolen
10 shipment, none of it will come in.

11 MR. LEVIN-EPSTEIN: Very well, your Honor.

12 THE COURT: I would like to say that the instruc-
13 tions ought to be much clearer as to what is said at
14 these arraignments so this doesn't happen again. Don't
15 you give these people a card and tell them to call you
16 if they have any problems?

17 MR. CHREIN: We give them a card.

18 What I stated on the witness stand is in essence
19 a summary of our conversation with the defendant.

20 THE COURT: Maybe you ought to give them some-
21 thing in writing so they understand what they are sup-
22 posed to do.

23 MR. CHREIN: My own experience in supervising
24 attorneys that are on their initial appearance before
25 the Magistrate would indicate this is quite forcefully

EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION
RE: SWEATERS
brought home.

331 156a

THE COURT: That was my impression. I was under
the impression, as all the Judges are, that you run
your office extremely well, and this is one of the best
run Legal Aid offices in the country.

I have also been impressed by the way you run
things, and the way your attorneys run things, and I
am surprized that this happened, and I attributed it,
I must say, wholly to the defendant.

(continued on next page.)

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EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION
RE: SWEATERS

Ruderman - voir dire/Levin-Epstein

BERNARD RUDERMAN, having been first duly

Sworn by the Clerk of the Court, testified as follows:

VOIR DIRE EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q What is your occupation, Mr. Ruderman?

A Sales Manager for Suebe Fashions.

Q Where is it located?

A 252 West 38th Street.

Q As Sales Manager for Suebe Fashions, what are
your duties?

A Selling merchandise, plus general office work.

Q As part of your duties, are you familiar with
shipments that are received from manufacturers to Suebe
Fashions?

A Yes.

Q Do you have contact with various documents that
relate to these shipments?

A Yes.

Q Mr. Ruderman, I show you Government's Exhibit 2
in evidence. I tell you that it consists of an airway bill.
Do you recognize it?

A Yes.

Q Can you describe for the Court how you come to
recognize it?

Ruderman - voir dire/Levin-Einstein

A This is an airway bill covering 44 containers of men's pullover sweaters.

Q Are you familiar with this shipment?

A Yes.

Q As described in the Government Exhibit?

A Yes.

Q Can you tell the Court whether or not you ever received, or Suebe Fashions ever received this shipment?

A No, we never received the shipment.

Q Do you know why?

A It was stolen.

Q When did you find out that the shipment was stolen, Mr. Ruderman?

A Monday, November 26th, about 9:00 or 10:00 o'clock in the morning.

Q Are you familiar with the description and quality of the garments that were in the shipment that was referred to in the airway bill?

A Yes.

Q Will you be able to recognize the garments if you were shown them?

A Yes.

Q Mr. Ruderman, I show you Government's Exhibits 4-A and 4-B for identification. I ask you, are you familiar with

1 Ruderman - voir dire/Levin-Epstein 334

2 these garments?

3 A Yes, these were the garments that were in the
4 shipment.

5 Q Now, in all fairness, Mr. Ruderman, how do you
6 know that these are the garments?

7 A Number one, it has our RN number.

8 Q Will you describe what an RN number is?

9 A 33662 is our number, designated by the United
10 States, covered by the products labeling law.

11 Q This number is exclusively assigned to Suebe
12 Fashions?

13 A Correct.

14 MR. LEVIN-EPSTEIN: May the record indicate
15 that the labels inside both Government Exhibits, 4-A and
16 4-B, bear the RN 33662.

17 Q Do these two sweaters -- Withdrawn.

18 The two sweaters marked Government's Exhibits
19 4-A and 4-B, Mr. Ruderman, can you say with certainty that they
20 resemble the sweaters in the stolen shipment?

21 A Yes.

22 Q Can you say with certainty that they do come
23 from that stolen shipment?

24 A With certainty, no.

25 Q With how much certainty can you say that you are

1 Ruderman - voir dire/Levin-Epstein 335

2 sure that these are probably or not probably from that shipment.

3 MS. SELTZER: Objection, your Honor.

4 THE COURT: I will allow it. Go ahead.

5 A I beg your pardon?

6 Q I will rephrase the question.

7 With how much certainty can you say that they are
8 from that shipment?

9 A Oh, about 95 percent sure.

10 Q Mr. Ruderman, based upon your experience and
11 knowledge at Suebe Fashions, can you give us a value for the
12 stolen merchandise?

13 A \$65,000.

14 MR. LEVIN-EPTSTEIN: One moment, your Honor.

15 (Pause.)

16 Q Mr. Ruderman, you said a moment ago that you
17 would be 95 percent sure that these two sweaters came from the
18 stolen shipment.

19 Why do you say 95 percent, as opposed to some-
20 thing else?

21 A Well, there was a shipment that came in approxi-
22 mately ten days later. We had to call in with the same type
23 of merchandise.

24 Q Was there a reason that the second shipment ar-
25 rived ten days later?

1 Ruderman - voir dire/Levin-Epstein 336

2 A Yes, because this shipment was stolen, and we
3 needed the merchandise.

4 Q Was the second shipment of the same quality?

5 A The exact same type of garment.

6 Q Did there come a time when I requested you by
7 telephone to investigate what the disposition of the second
8 shipment was?

9 A I made a list, and I gave you the list of the
10 customers that we sent to within that weeks period.

11 MR. LEVIN-EPSTEIN: May this be marked for
12 identification, your Honor?

13 THE CLERK: Government's Exhibit 7 for identi-
14 fication.

15 (Shown to counsel.)

16 MS. SELTZER: I have no objection.

17 MR. LEVIN-EPSTEIN: Without objection, it may be
18 offered into evidence, your Honor?

19 THE COURT: Yes.

20 THE CLERK: Deemed marked in evidence for the
21 purposes of the hearing.

22 THE COURT: Yes.

23 Q Mr. Ruderman, I show you Government's Exhibit 7
24 in evidence, and I ask you if you recognize it?

25 A Yes.

RE: SWEATERS

Ruderman - voir dire/Levin-Epstein 337

Q What is it?

A This is the list I compiled at your request.

Q Very well.

Mr. Ruderman, based upon this investigation that you testified that you made, can you tell us -- First of all, can you tell us when the second shipment arrived?

A Arrived in my premises December 3rd.

Q Of 1973?

A Yes.

Q Was the shipment intact when you received it?

A Yes, it was.

Q What did you do with the shipment after receiving it?

A It's normally broken down, placed in boxes and shipped out to customers.

Q What do your records reflect as to the disposition of the second shipment?

A Part we shipped out to customers, and part was put into stock.

Q Based upon the list that you have compiled, can you tell us what information you have as to the disposition of the second shipment?

A Again, as I say --

Q Specifically.

1 Ruderman - voir dire/Levin-Epstein 338

2 A I have a number of customers here that were not
3 in that week.

4 Q Could you inform the Court as far as that list
5 is concerned, specifically?

6 A Some went to Philadelphia, some went to Detroit,
7 some went to Baltimore, some went to Washington, Chicago,
8 some New York, and that's it.

9 Q Can you tell us from your investigation, Mr.
10 Ruderman, how many of those sweaters in the second shipment
11 were distributed to customers in the New York area?

12 A You want a total figure here?

13 Q Please.

14 A Approximately 1200 pieces went out against this
15 list.

16 Q In the New York area?

17 A In the New York City area?

18 Q Yes.

19 A 89 pieces.

20 Q 89 pieces, by that you mean 89 individual gar-
21 ments?

22 A 89 units.

23 Q Is this a unit (indicating)?

24 A Yes.

25 MR. LEVIN-EPSTEIN: Holding up one Exhibit, your

Ruderman - voir dire/Levin-Epstein

339

Honor.

Q Did you ever receive any reports that the sweaters that you shipped out, after you received the second unit, had not been received?

A No.

Q Did you ever receive any reports that the sweaters that you shipped out as part of the second unit had not been complete when they were received?

A No.

Q Based upon your review of your files, Mr. Ruderman, and based upon the quantities of sweaters that were shipped out, pursuant to the second shipment's arrival, can you form a conclusion as to what your opinion is as to the likelihood of these sweaters, Government's Exhibits 4-A and 4-B for identification --

MS. SELTZER: Objection.

THE COURT: Let him finish the question, please.

Q -- based upon that, what you have just testified about, can you form a conclusion as to whether or not these two garments, Government's Exhibits 4-A and 4-B, came from that first stolen shipment?

MS. SELTZER: Objection.

THE COURT: How long have you been in the trade?

THE WITNESS: About eighteen years.

Ruderman - voir dire/Levin-Epstein 340

THE COURT: I will allow it.

A I would say it came out of the first shipment.

MR. LEVIN-EPSTEIN: No further questions, your

Honor.

CROSS-EXAMINATION

BY MS. SELTZER:

Q Mr. Ruderman, from where did the sweaters that
you ordered come?

A From Italy.

Q Who manufactured them in Italy?

A Manufactured by Depe. Depe is a manufacturer
in Italy.

(continued on next page.)

GR fls

CROSS-EXAMINATION

BY MISS SELTZER: (Cont.)

Q And do they -- do you own that company?

A No.

Q Do they make sweaters exclusively for you?

A No.

Q Do you have any control over what they do with the merchandise that they make?

A No.

Q Do you have any knowledge what quantities of sweaters of that type they produce?

A No.

Q Do you have any knowledge of whether they have produced any other sweaters of the same model with the same labels and sent them to the U.S.?

A No. Do I -- would you repeat that question again, please.

Q Do you have any knowledge of whether in fact, there are other shipments of identical sweaters with identical labels sent to the U. S.?

A No.

Q Now, when these shipments are sent, are they sent in boxes?

A Containers.

1 2 Ruderman - cross

2 Q What --

3 A We call them containers. They are -- they
4 are reenforced Itokin (phonetic) cartons.

5 Q Do they have labels on them?

6 A On the cartons?

7 Q Either on the cartons or on the sweaters?

8 A Of course. Yes. They have labels on the
9 cartons.

10 Q Are there any labels on the sweaters?

11 A Yes.

12 Q What kind of labels? Just labels that are in
13 - the neck?

14 A That is right.

15 Q Any other labels?

16 A No.

17 Q There are no other labels?

18 A No other labels.

19 Q Now, you are sure of that?

20 A Yes.

21 Q Now, these sweaters that you receive you then
22 send to stores; right?

23 A Correct.

24 Q And the stores that you deal with, are those
25 retail stores?

RUCERMAN - DIRECT

1 3
2 A Yes.

3 Q These are stores where anyone can walk off the
4 street and buy the sweaters; is that correct?

5 A Yes.

6 Q You say the only labels that are on the sweaters
7 when they come from Italy are these labels; is that
8 correct?

9 A Yes.

10 Q These two labels?

11 A Yes.

12 Q The one indicating size and the one saying --

13 A That is right.

14 Q -- Signor Valentino?

15 Now, on this white sweater I notice that there
16 is a plastic --

17 A That is a hang tag.

18 Q That is a hang tag?

19 A It's a piece of cardboard stating Signor
20 Valentino and the style number.

21 Q Where is the hang tag? Where does it say
22 that?

23 A That's on the hang tag.

24 Q Well, does the tag come off, off of this
25 or what?

A I don't know.

4

Ruderman - direct

344

1

2

Q Would it normally be on?

3

A It has to be.

4

Q But it isn't on now?

5

A No.

6

Q Now, how many years have you been dealing
with this company in Italy?

7

8

A Approximately eight years.

9

Q And what length of time have they been making
this style of sweater?

10

11

A Approximately eight years.

12

Q Exactly this style?

13

A Yes.

14

Q For how many years in the past have you been
receiving shipments of these style sweaters?

15

16

A Through the eight years we have been receiving
shipments of it.

17

18

Q Of this particular sweater?

19

A Of that particular sweater?

20

Q Yes.

21

A This is the first year we received it.

22

Q Well, prior to the shipment that was stolen--

23

A Yes.

24

Q --on November the 25, I believe, had you received
other shipments of this identical sweaters?

25

1 5
2 A Yes.

3 Q How many shipments had you received?

4 A One.

5 Q And how many sweaters were in that shipment?

6 A Approximately 15,000.

7 Q And what did you do with those 15,000 sweaters?

8 A Sent them out to various customers.

9 Q And could you tell us of those 15,000 sweaters,
10 how many would you -- did they all have the same markings

11 as these two?

12 A Exactly.

13 Q Those 15,000 sweaters, can you tell us how
14 many were distributed within the New York area?

15 A I have no way of knowing.

16 Q Well, would you be able to find out?

17 A It's possible.

18 Q So that when you conclude that only -- I forget
19 what it was, 80 or 90 or a hundred sweaters --

20 A 80-some-odd.

21 Q 80 sweaters were distributed of this type
22 in the New York area, you were incorrect; is that correct?

23 A No.

24 Q How many sweaters, exactly looking exactly like
25 this, with exactly the same labels, have been distributed
or had on December 18, 1973?

EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION
RE: 6 SWEATERS Ruderman - cross 346

1
2 How many had been distributed in the New York
3 area? From all shipments that you received from Italy?

4 A We are --

5 Q The number is more than 89, isn't it?

6 A Of course, but we are talking of two different
7 things.

8 Q No. We are talking about sweaters.

9 A Two different things.

10 We were discussing December 3rd shipment. You
11 are discussing a June or July shipment.

12 Q Well, when you look at these sweaters --

13 A Yes.

14 Q -- can you tell me whether this sweater comes
15 from the shipment that you -- that was stolen on December-
16 excuse me -- on November 25th, whether these sweaters come
17 from the first shipment of 15,000 sweaters or whether the
18 shipment comes -- this sweater comes from the third shipment?

19 Is there any way that you can tell which
20 shipment this sweater comes from?

21 A It would have -- I would assume it comes from
22 the second shipment.

23 Q But how can you tell by looking at this sweater?

24 A Because the first shipment came in in June and
25 it was shipped out to customers. They would reorder it and

7

Ruderman - cross

the same customers have reordered it.

347

Inbetween we brought in a different model of the same turtleneck. Therefore, this turtleneck came in in November. This shipment here came in November.

Q You've misunderstood my question. I understood that you said that there were 15,000.

A The first shipment.

Q Looking exactly like this?

A Exactly.

Q Distributed?

A Correct.

Q How do you know this isn't one of those 15,000? How do you know? Is there any way by looking at it that you can tell?

A No.

Q So that means when you arrived at the number 95 percent, you are only using a percentage based on that one shipment; is that correct?

A No, I am not.

Q You are not using 15,000 that came in previously and you are not using --

A The 15,000 is gone, has been sold.

Q But you don't know whether these were in that shipment, do you?

A No. I don't know.

8

Ruderman - cross

MISS SELTZER: No further questions.

THE COURT: All right.

I'll take the evidence but I don't want
the witness to give us any percentages. Just give
us the fact. Let the jury decide what the proba-
bilities are.

MR. LEVIN-EPSTEIN: Very well, your Honor.

THE COURT: Anything further tonight?

You can step down. I am sorry you are going
to have to be here tomorrow. The attorney will tell
you when, we will try to get you out in the morning.

Anything further?

MR. LEVIN-EPSTEIN: Nothing further, without
the jury, your Honor.

THE COURT: All right.

Now, you have the charge. I will hear you on
the charge.

MISS SELTZER: Your Honor, I'm going to have one
additional request to charge which I haven't made
up at this point in view of the fact that these two
sweaters are being admitted. I would request that
a charge be given on the misdemeanor section of
Section 659 of Title 18, USC, which states that
..."property valued at under \$100 is a misdemeanor."

Ruderman - direct 386

B E R N A R D R U D E R M A N , called as
a witness herein, having been first duly sworn
by the Clerk of the Court, was examined and
testified as follows:

DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q What is your occupation, Mr. Ruderman?

A I'm a sales manager.

Q For whom?

A Suebe Fashions.

Q Where is Suebe Fashions located?

A 262 West 38th Street.

Q What are your duties as sales manager,
Mr. Ruderman?

A Selling, overseas selling of the merchandise,
plus general office work.

Q And do you supervise these shipments from
overseas?

A Yes.

Q In the course of your duties as sales -- pardon
me -- as sales manager for Suebe Fashions, do you come in
contact with these shipments?

A Yes.

Q How long have you been in this business,

1
2 Mr. Ruderman?

3 A About 18 years.

4 Q Can you describe for the jury what business
5 it is that you are talking about when you say 18 years?

6 A Importing of knitwear.

7 Q And what familiarity would you say you have
8 with knitwear?

9 A Quite a bit.

10 Q I'm sorry?

11 A Such as a -- knowing what duty rates they
12 would fall into, what styling, etc..

13 Q What about the garments themselves?

14 A The make up of it?

15 Q Sure.

16 A Yes, I would know the makeup of the garment.

17 Q All right.

18 Mr. Ruderman, I show you Government's Exhibit
19 2 marked in evidence and I inform you that it has been
20 identified as an airway bill.

21 Q Do you recognize it?

22 A Yes.

23 Q Can you describe for the jury whether or not
24 Government's Exhibit 2 in evidence describes a particular
25 shipment?

A Yes. This covers our shipment of 44 containers

Ruderman - direct

388

of men's sweaters, consigned to us from a mill in Italy.

Q consigned to Suebe Fashions?

A Yes.

Q How do you know that?

A By the number -- markings here, Number 2, where it says Suebe Fashions.

Q So it actually says the name of the consignee?

A That's correct.

Q Did there come a time -- withdrawn.

The date of this shipment on the airway bill is in November of last year, 1973. Do you have any knowledge as to whether or not Suebe Fashions ever received that shipment?

A We never received it.

Q Do you know why?

A It was stolen.

Q When did you learn that it had been stolen?

A On November 26.

Q Approximately what time?

A Between 9:00 and 10:00 o'clock in the morning.

Q As a result of your learning -- excuse me -- as a result of your learning that you were not going to receive this shipment and that it had been stolen, did you do anything?

A Yes.

Ruderman - direct

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Q What did you do?

A I contacted Lufthanza Airlines.

Q Yes.

A Contacted their security department there to advise them of the lost shipment and they were supposed to get back to me.

Q Mr. Ruderman, I show you Government's Exhibit 4A and 4B marked for identification at this time.

And I ask you, sir, do you recognize these two garments?

A Yes.

Q How do you recognize them?

A By the markings in the garment and the label and the characteristics of the garment.

Q What are they?

A Well, it's made in Italy for Signor Valentino with our RN number.

Q Would you describe for the jury what an RN number is?

A It's a registered number given to us by the U. S. Government, covered by the Wool Products Label Law.

Q And what -- I'm sorry.

A We must have this attached to each garment

Ruderman - direct

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that we bring in.

Q What is the RN number assigned to Suebe Fashions by the U. S.?

A 33662.

Q And is that the number that appears in Government's Exhibits 4A and 4B?

A Yes.

Q Are you familiar, Mr. Ruderman, with the characteristics and description of the various garments which consisted of the packaging and shipment in the stolen 44 cartons?

A Yes.

Q Can you determine what the relationship as to description between these two garments has to the two -- to the garments that were in that shipment?

A The same.

Q How close are they?

A Exactly.

Q Exactly the same.

MR. LEVIN-EPSTEIN: Your Honor, I now offer Government's Exhibits 4A and 4B in evidence.

THE COURT: Any objection?

MISS SELTZER: Just my previous objections, your Honor.

THE COURT: What is your previous objection?

MISS SELTZER: Previous objections are that there has not been a proper foundation laid.

THE COURT: Improper foundation? Overruled. I will take it.

You understand, ladies and gentlemen, the fact that I am allowing these exhibits to come in does not indicate that I believe that they were a part of the shipment or they weren't a part of the shipment or that they were found in defendant's house or that they were not.

That is for you to decide. All I am ruling is that you may consider the evidence.

Is that clear?

THE CLERK: Government's Exhibits 4A and 4B marked in evidence.

(So marked.)

MISS SELTZER: I am sorry, your Honor. I was under the impression that they had already been admitted into evidence earlier.

THE COURT: No.

(continued next page.)

xx

FK flws.

Ruderman-direct/cross

Q Mr. Rudder³⁹²man, based upon your experience and based upon your knowledge of this particular shipment, can you tell the jury what the value of the stolen shipment was?

A Approximately \$65,000.

Q Mr. Rudder³⁹²man, let me ask you can you say with positive certainty that Government's Exhibit 4A and B in evidence did come from that load, the stolen load?

A With some certainty, yes.

MS. SELTZER: I would object to the question.

THE COURT: Sustained, if you object.

MR. LEVIN-EPSTEIN: I will reframe the question.

I will withdraw the question, your Honor. No further questions at this time.

CROSS-EXAMINATION

BY MS. SELTZER:

Q Mr. Rudder³⁹²man, you have been working for Suebe for quite some time; is that right?

A Yes.

Q During that period of time have you been consistently importing this from Italy?

A Yes.

Q How long have you been importing this from Italy?

A Approximately ten years.

EXCERPT FROM TESTIMONY OF BERNARD RUDERMAN-DIRECT EXAMINATION
RE: SWEATERS

Re: Ruderman-Deppi

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Q From what particular country did the knits --
excuse me -- from what particular manufacturer did they come
from?

A Magnifico Deppi.

Q Where are they located?

A Cossano, Italy.

Q How long have you been dealing with that firm?

A Approximately six years.

Q Did they make exclusively for you or did they
sell to other distributors or other stores?

A They make items exclusively for us and they
sell other stores.

Q In other words, you do not own that company,
your company does not own that company?

A No.

Q Does your company have any control over the
Italian company, in other words, do you control their
production?

A No.

Q Do you have any idea whether in fact they ever
made sweaters like this for any other people?

A No idea.

Q This particular sweater, this particular model,
is that right?

Ruderman-cross

394

A That is right.

Q For how long -- I do not remember the name.

A Deppi.

Q How long has Deppi been making this particular model of sweater for your company?

A Six years.

Q And in that period of six years how many sweaters of that sort have been sent to you in the United States?

A I will take a guess -- a quarter of a million.

Q Is there any way that you can say anything further than those sweaters look like the other sweaters?

A Yes.

Q That have been sent to you over a period of time?

A Definitely.

Q How would you say that?

A By the content.

Q What do you mean by the content?

A The wool content. As of the beginning of 1973 we had to change our content. Originally, those sweaters were 100 per cent wool.

Q You did not understand my question.

MR. LEVIN-EPSTEIN: May the witness finish his answer?

THE COURT: Yes.

Q I am sorry.

A Then we had to change to a blend due to the fact that the price of wool went sky high so we kept the same style but changed the content.

Q So then how many of this particular sweater with this particular wool content have been sent to the United States by Deppi to you with that label, that same label?

A 1973?

Q No, always with that identical sweater.

A In 1973 we are talking?

Q I am talking in all time.

A 45,000.

Q Is there anything of the other 399-some-odd-thousand sweaters that is different from those two sweaters?

A I am sorry, I do not understand.

Q In other words, is there anything in other words, you received several shipments of this particular kind of sweater; is that right?

A That is right.

Q Is there anything peculiar or particular about these two sweaters that would let you know that they were in the shipments that was hijacked on November 26th?

EXCERPT FROM TESTIMONY OF BERNARD RUDERMAN-DIRECT EXAMINATION
RE: SWEATERS
Ru derman-cross

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A Yes.

Q What is about these, is there something you can look at that says it was on the November 26th shipment?

A Yes.

Q What is it?

A This bottom.

Q Did you receive an earlier shipment of sweaters?

A Yes.

Q Were they identical to these sweaters?

A Yes.

Q Did they have a bottom like this bottom?

A Yes.

Q How do you know that these sweaters didn't come from the earlier shipment?

A The earlier shipment came in the early part of June.

Q How many sweaters in that shipment?

A Probably 15,000.

Q Was there a later shipment that came in?

A Yes.

Q Identical sweaters?

A Yes.

Q How many sweaters were in that shipment?

A Approximately 60,000.

EXCERPT FROM TESTIMONY OF BERNARD RUDERMAN-DIRECT EXAMINATION
RE: SWEATERS

Rudderman-redirect

MS. SELTZER: Thank you. No further ³²⁷ questions.

REDIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q Mr. Rudderman, you testified that you had three shipments of the exact number model wool content sweaters of this sort; is that right?

A That is right.

Q When did you get the first shipment?

A In June.

Q You said that consisted approximately of 15,000 sweaters also?

A That is right.

Q What happened to those 15,000 sweaters?

A They were sold to various customers throughout the United States.

Q They were distributed by Suebe Fashions?

A Yes.

Q Did you ever have or were you ever notified that of the first shipment, meaning back in June, that any of those shipment sweaters were reported missing?

A Not to my knowledge.

Q Did you ever have any notification by any of your customers on that first shipment in June that any packages you sent out to them did not arrive intact?

Ruderman-redirect

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A No.

Q Do you also stock sweaters when they arrive from Italy?

A Yes.

Q Now what do you mean by stock?

A We take them and we box them and we keep them for inventory purposes.

Q Can you give us an estimate of how many sweaters in the first shipment were inventoried that way?

A Approximately.

Q And the rest were shipped out to customers I think you testified?

A Right.

Q Well, five months before the date of this hijacking?

A Right.

Q Can you examine these two sweaters and tell us from your examination what kind of shape they are in in terms of wear and tear?

MS. SELTZER: Objection, your Honor, as irrelevant. These sweaters were in the possession of the Government for two or three months.

THE COURT: Sustained.

MR. LEVIN-EPSTEIN: Your Honor, may I have an

EXCERPT FROM TESTIMONY OF BERNARD RUDERMAN-DIRECT EXAMINATION
RE: SWEATERS

Rudderman-redirect

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offer of proof on this?

THE COURT: What are you going to show, they were not used?

MR. LEVIN-EPSTEIN: Well, amongst other things, If Miss Seltzer is suggesting these sweaters have been in the Government exclusively since they arrived in the country we will stipulate to that except the time they were hijacked.

MS. SELTZER: No, I am not stipulating those sweaters were hijacked.

THE COURT: Sustained.

MR. LEVIN-EPSTEIN: I will withdraw the question on that basis.

Q Mr. Rudderman, the third shipment, the hijacked one being the second shipment, can you describe to the jury when the third shipment arrived?

A December 3rd.

Q December 3rd, that is very quickly apparently compared to the other two shipments after the stolen shipment. Why was that?

A Well, we set up a schedule of orders in a sequence that we can call them in any given time and they would have them stocked for us. When the first shipment came in it was sold and distributed. Then the second

Rudderman-redirect

400

shipment we called in came in and then it was hijacked and we had to replace it immediately so we called in for the third shipment and it took a matter of days to get here.

Q Did there come a time when the third shipment was disposed of by Subie Fashions?

A Yes, over a course of normal business.

Q Upon my request, Mr. Rudderman, did you investigate the files of Subie Fashions and the records of your firm to determine exactly what happened to that third shipment?

A For a certain period of time, yes.

Q Did you prepare a list of certain items and their disposition for me and for purposes of that request?

A Yes.

Q I show you Government Exhibit 7 marked for identification. I ask you if you recognize it.

A Correct, it is the one I made up for you.

MR. LEVIN-EPSTEIN: Your Honor, may this be marked in evidence?

MS. SELTZER: May I see it, please?

MR. LEVIN-EPSTEIN: I offer it in evidence, your Honor.

THE COURT: Any objection?

EXCERPT FROM TESTIMONY OF BERNARD RUDERMAN-DIRECT EXAMINATION
RE: SWEATERS Ruderman-redirect

4 01

MS. SELTZER: No objection.

THE COURT: All right, it may be marked in evidence.

THE CLERK: Government Exhibit 7 for identification marked in evidence; so marked.

MS. SELTZER: The Government apparently analyzed the handwriting and apparently there was no report. Therefore, I have had the opportunity to have that handwriting analyzed and to have an expert who will testify here today as to his conclusion on who signed or who did not sign the authorization to tow.

In addition to that, the Government, except for that handwriting, except for those two sweaters, the Government's case is also based on the identification of three tow truck workers. Either Mr. Messina was in Bob's service or either Messina was at the Sunoco station that evening at 10:00 o'clock or he was not. How do we show to you he was not there? The only way I can show he was not there is to bring to you the people he was with that night. We happen to be very fortunate. It happens that evening Mr. Messina and his wife and two other couples went to Club 802 which is a club in Brooklyn and that night they happened to see Jimmy Rizelli, who was performing.. If he had not

Seltzer-opening

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2 had that particular incident to enable them to recall
3 that evening we would have been in more serious
4 circumstances than we are now. But I have the
5 witnesses and I have the friends of Mr. Messina who
6 were with them that night and they will testify to it.

7 All I ask you at this time is to keep an open
8 mind and I am sure you have been doing it throughout
9 the trial.

10 The Government has the burden of proving their
11 case. The defendant does not have any responsibility
12 in a criminal trial. If he wanted to, he could have
13 sat here through the entire trial and we could in
14 fact not produce any evidence if we so desired
15 because the defendant is presumed to be innocent
16 and he is entitled to require the Government establish
17 guilt beyond a reasonable doubt.

18 We have here decided to take an affirmative
19 duty upon ourselves and through my witnesses I hope
20 to show there is a very, very serious doubt as to the
21 conclusion and as to the identity that was made by
22 those three tow truckdrivers.

23 I will call my first witness, a handwriting
24 expert, Mr. Cromwell.
25

Q Now you tell the jury, if I may, what happened to the sweaters that were part of this third shipment?

A They were sent out to various cities, Detroit, Philadelphia, Baltimore, Washington, Chicago, New York City.

Q How many sweaters did they send out in total?

A Approximately 1200 sweaters for the first week.

Q You said as part of that list I believe that certain sweaters were sent to outlets in the New York City area?

A That's right.

Q How many sweaters?

A Eighty-nine.

Q Eighty-nine out of a total of 15,000 sweaters?

A Sixteen.

Q Sixteen?

A Yes.

MS. SELTZER: I object. I think it was 39 out of 1200.

THE WITNESS: No, 10,000 came in.

MS. SELTZER: But I think you said only 1200 were shipped out.

THE WITNESS: That week.

MR. LEVIN-EPSTEIN: Can we have it read back.

THE COURT: You can examine on it on cross-

1
2 examination. Are there any further questions?

3 MR. LEVIN-EPSTEIN: Perhaps one, your Honor.

4 Q Based upon your investigation of your files and
5 your knowledge of the business and what happened to the
6 sweaters as you distribute them, how sure --

7 MS. SELTZER: Objection, your Honor.

8 THE COURT: On what ground?

9 MS. SELTZER: I believe this was gone over on
10 some point previously.

11 THE COURT: As repetitive? I cannot hear you,
12 Ms. Seltzer.

13 MS. SELTZER: I think it was discussed yester-
14 day.

15 THE COURT: Are you objecting to it on the
16 ground it is repetitive?

17 MS. SELTZER: No. Should we approach the bench?

18 THE COURT: Continue the question.

19 Q Can you tell us how sure you are that these
20 sweaters as you have testified before came from the hijacked
21 load?

22 MS. SELTZER: Objection.

23 THE COURT: Sustained.

24 Ladies and gentlemen, you will have to decide
25 that yourself based upon the circumstances you have

1 heard.

2
3 Q Mr. Ruderman, Government Exhibit 4-A and 4-B,
4 how close a resemblance do they bear to the sweaters in the
5 hijacked load?

6 A Exactly.

7 Q No difference?

8 A No difference.

9 MR. LEVIN-EPSTEIN: No further questions.

10 RECROSS EXAMINATION

11 BY MS. SELTZER:

12 Q Mr. Ruderman, there were 15,000 other identical
13 sweaters that came in previously?

14 A Correct.

15 Q Do you have a list of how many of those were
16 distributed in the New York area?

17 A No.

18 Q Is it possible of all the 15,000 a good part
19 of them were distributed in the New York area?

20 A No.

21 Q Are we dealing with the same people at that
22 time that you were dealing with?

23 A That is right.

24 Q So that means a quantity of the 15,000 were in
25 fact probably distributed in this area?

4

Ruderman-re-cross

409

A A quantity, yes.

Q When you were notified that the shipment had been hijacked or had been stolen from the cargo building at Kennedy you said you immediately got a new shipment of identical sweaters?

A Yes.

Q What period of time elapsed between the time they were sent off to you and the time you notified the people in Italy, Deputy, that you needed replacement?

A A matter of five or six days.

Q They in most probability had another 44 cartons or 11,000 sweaters of this sort already made?

A Yes, I explained that.

Q Do you have any idea in addition to those 11,000 they had already made whether they may have had another 11,000 or 15,000?

A They have right now for us 20,000 when we call them, not these.

Q I am talking about these, the ones with this wool content and chis fringe.

A No, they are no more like that.

Q But at that time they had at least another, what was it, 11,000?

A 16,000.

5

Ruderman-recross

410

Q 16,000. For all you know they may have been manufacturing identical sweaters like that and selling them to other people?

A Possibly.

Q You wouldn't know that?

A No.

Q Is there anything about that sweater as you look at it that would indicate that it was not purchased at a retail store?

A That I can't tell you.

Q If you walked into a store and you wanted to buy a sweater that was imported by you, your company, they would look like this, wouldn't they? I could buy a sweater somewhere in New York?

A Not like that. It would be in a bag, it would be neater, it would have a hang tag on there, some more glamorous look to it.

Q It would be the same thing?

A Yes.

Q When you import them do they come in plastic bags?

A Yes.

Q Have you ever seen these in a condition in plastic bags since they were seized?

1
2 A No, this is the first time I have seen them. 411

3 Q Before you take them out of the carton what kind
4 of plastic bag are they in?

5 A A plastic bag with just markings on it.

6 Q What markings?

7 A Made in Italy with the size.

8 Q And each individual sweater?

9 A Each individual sweater in an individual bag
10 with markings on it of the size.

11 Q Is there any way that you can say with certainty
12 that these sweaters are not part of the original 15,000 piece
13 shipment that you received in the early part of 1973, by
14 looking at them?

15 A By looking at them I would say they are not
16 from the first part.

17 Q How would you know by looking at them?

18 A By looking at them I see they definitely could
19 be from the second part.

20 Q They could also be definitely from the first
21 part?

22 A No.

23 Q How many sweaters did you bring in in 1973
24 prior to the hijacking that were absolutely identical with
25 these two sweaters, with the same label, the same tag?

A As I say, about 45,000.

Q Is there any way that you can tell that these two sweaters -- is there anything that you can tell by looking at them?

A Yes, by the blue one. We changed the color on the second shipment.

Q O.K., that is what I want to know. Would it have been the third shipment?

A Same color.

Q Is there any way you can tell these are not amongst the 15,000 by looking at them, I am not asking you to figure out mathematically.

A No.

Q Just as a person, you know, with your own powers of identification and of sight, is there any way by looking at them you can tell they are not from the other 15,000 piece shipment?

A That I received?

Q From that 15,000 shipment.

A I do not follow the question, I am sorry.

Q You said you received 15,000 more sweaters like that, is that right?

A I received over 30,000.

Q Is there any way --

EXCERPT FROM TESTIMONY OF BERNARD RUDERMAN-REDIRECT EXAMINATION
RE: SWEATERS Ruderman-recross 413

1 A We established you see the blue we changed from
2 the first shipment. That should have been in the second
3 shipment, that particular color.
4

5 Q They were also in the third?

6 A Third, right.

7 Q Is there any way by looking at them without
8 knowing Mr. Messina is going to be arrested and at this trial-

9 MR. LEVIN-EPSTEIN: Would the witness be
10 allowed to finish the answer?

11 A Would you want me to establish this could be
12 in the third shipment.

13 Q By looking at them is there any difference?

14 A No, I cannot tell if they were not in the third
15 shipment.

16 MS. SELTZER: That is all.

17 THE COURT: You may step down.

18 MR. LEVIN-EPSTEIN: The Government rests, your
19 Honor.

20 THE COURT: Does the defense have any witnesses?

21 MS. SELTZER: Yes, your Honor.

22 THE COURT: Call them, please.

23 MS. SELTZER: Your Honor, at the opening of the
24 case I reserved my right to open. I would just make
25 a brief statement to the jury at this time.

Jules - direct

FRANCIS R. JULES, called as a witness,
having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q You have testified before in this case so
I am not going to belabor the record with further explana-
tion of who you are.

Once again I direct your attention to
December 18 of 1973, that was the date you testified
the defendant Charles Messina was arrested.

On that date did you make the arrest?

A Yes.

Q Where was that arrest?

A At his residence.

Q Who else was present?

A Detective McKenna and Detective Maiolla from
the Port Authority Police Department.

Q Did you actually inform the defendant he was
under arrest?

A Yes.

Q What else did you say to him?

A I told him what he was being charged with.

Q Did you say anything else?

A Advised him thoroughly of his rights.

2 Jules - direct

Q Did he acknowledge the advice of rights orally?

A Yes, he said I know my rights.

Q Did there come a time when you advised him
of his rights again?

A Yes, in the New York office of the FBI.

Q Was this done orally also?

A I presented him with a form, a waiver of
rights form.

Q I show you Government's Exhibit 6 marked for
identification and I ask you if you recognize it.

A Yes.

Q What is it?

A Waiver of rights form signed by Charles Messina
and witnessed by myself.

Q Was it signed in your presence?

A Yes.

Q Did you inform him of the rights that are
printed on this form?

A Yes.

Q Did you read them to him?

A Yes, and he read them.

Q After he read them did he acknowledge that
he had read them?

A Yes.

3

Jules - direct

Q Did he acknowledge that he had read them?

A Yes.

Q How did he do so?

A By signing it.

MR. LEVIN-EPSTEIN: I offer it in evidence.

THE COURT: No objection having been noted
it is admitted.

THE CLERK: Government's Exhibit 6 for
identification now marked in evidence.

Q I direct your attention to Government's
Exhibit 6 in evidence and ask you does there appear at
the top of the form some notations made in ink?

A Yes.

Q Can you describe what those notations are?

A Place, New York, date 12/18/73, the time
10:30 a.m.

Q Who made those notations?

A I did.

Q After having advised the defendant twice of
his rights as you testified, did you engage him in con-
versation?

A We then left the office and went to the
Eastern District of New York in this building for arraign-
ment.

4 Jules - direct

Q Upon arrival at this building did you have
a conversation with the defendant?

A Yes.

Q Did he object to having this conversation
with you?

A No.

Q Did he tell you at that time he did not want
to be interviewed by you?

A No.

Q Did he tell you at that time that he wanted
to see a lawyer?

A No.

Q Did he inform you as part of these rights
that he had a right to a lawyer?

A Yes.

Q Did he agree to speak to you voluntarily?

A Yes.

Q Can you tell the jury what that first con-
versation consisted of?

A He stated he wanted to say something and that
he had nothing to do with this hijack load.

Q You informed him of the hijack load?

A Yes.

Q Go on.

1 5 Jules - direct

2 A He stated that he wanted to tell me something,
3 that he had been trying to pedal some Italian knit sweaters.
4 He stated that late November on a Sunday he recalled that
5 he was at the Chateau Lounge on East 45th Street where
6 he met an individual he knew as Vinnie and Vinnie asked
7 him how he was doing and Mr. Messina stated he was on
8 disability and Vinnie asked him would he like to make
9 some money.

10 Q Did you ask him who Vinnie was?

11 A Yes, and he did not know his last name.

12 Vinnie asked Mr. Messina do you still go
13 to the social club on Snyder Avenue, somewhere off Utica,
14 and he said in fact I might go down tomorrow and play
15 cards, which would be Monday. He said he did go down
16 to the social club and that after being there for an
17 hour or two an unknown individual came in and asked for
18 Charlie.

19 (Continued on next page.)

20

21

22

23

24

25

Jules-direct

Q Did Mr. Messina give you the name of this individual?

A He said his name was Vinny, too.

Q Did he know the last name of this Vinny?

A No.

Q This Vinny told Charlie to go out in the automobile and take out some samples, I believe they were five of them.

A Mr. Messina did that but had no luck peddling the sweaters and he still had two left at home which if we wanted we could have.

Q Then what happened?

A Then we left the arraignment and we drove Mr. Messina home and he turned over the sweaters.

Q During the course of the ride from Eastern District of New York, the office here, the federal court house here, to Mr. Messina's home -- withdrawn.

When you finally arrived at Mr. Messina's home did he in fact turn over two sweaters to you?

A Not to me.

Q Did there come a time you received two sweaters?

A Yes.

Q Are these the two sweaters you received?

EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION
RE: SWEATERS AND ALIBI
Jules-direct

1
2 A Yes.

3 MR. LEVIN-EPSTEIN: The jury will recall these
4 are Government's 4A and 4B.

5 Q Agent Jules, on December 18 of last year
6 during the course of this day where you testified you had
7 this conversation and you were present with Mr. Messina
8 first at the New York office of the FBI and the Eastern
9 District office here, and then in the car while you took him
10 home, did he ever once mention anything to you about the
11 Club 802?

12 A No.

13 Q Did he ever mention anything to you about
14 being there on December 25, 1973?

15 A No.

16 Q Did he ever once mention to you having dinner
17 reservations at that club?

18 A No.

19 Q Did he ever mention once to you a couple that
20 he knew by the name of Schreiber?

21 A No.

22 Q Did he ever mention once to you a Mr. Morrelli?

23 A No.

24 Q Did he ever mention once to you anything about
25 a Jimmy Rosselli?

1 A No.

2 Q Or a comedian coming to their table?

3 A No.

4 Q When was the first time you ever heard anything
5 about the Club 802 and dinner and what happened that evening?

6 THE COURT: Do not answer that.

7 Q Were you present in court yesterday?

8 A Yes.

9 Q Did you hear Mr. Schreiber testify?

10 A Yes.

11 Q Did you hear Mrs. Schreiber testify?

12 A Yes.

13 Q Did you hear Mr. Morrelli testify?

14 A Yes.

15 Q Do you recall their testimony?

16 A Yes.

17 Q Had you ever heard a version of that testimony
18 before?

19 MS. SELTZER: Objection.

20 THE COURT: Sustained.

21 MR. LEVIN-EPSTEIN: May I ask on what grounds?

22 THE COURT: The defendant has no obligation
23 whatsoever to reveal his theory to you and the jury
24 may not draw any inference adverse to the defendant
25

EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION
RE: SWEATERS AND ALIBI

Jul s-direct/cross

Q Because the defendant doesn't talk to the FBI agent
or the defense counsel doesn't reveal anything to the
FBI agent. There is no necessity to do that.

A When the FBI doesn't hear anything it is of
no concern of this jury. The only reason the witness
is testifying is to testify as to what he observed and
nothing else.

Q Is it a fact, Agent Jules, the only story that
was ever told to you --

MS. SELTZER: Objection.

THE COURT: Sustained.

MR. LEVIN-EPSTEIN: No further questions.

CROSS-EXAMINATION

BY MS. SELTZER:

Q Agent Jules, you were with my client during a
good part of the day on December 13, 1973?

A Yes.

Q That was the date of his arrest?

A Yes.

Q During the course of that date did he complain
to you of a health problem?

A Yes, he wasn't feeling well.

Q What was the problem?

A He said he had a heart condition.

EXCERPT FROM TESTIMONY OF FRANCIS R. JULES-DIRECT EXAMINATION
RE: SWEATERS AND ALIBI 627

Jul s-cross

Q Did he have any medicine or anything like that?

A He might have had some pills. I am not positive.

Q You asked him if he needed medical help?

A Yes.

Q Was he concerned about this during the course of the day?

A Yes.

Q Isn't that the reason why you drove him home, because he wasn't feeling well?

A I said I would drive him home, yes.

Q It was he that offered to cooperate with you, is that correct?

A Yes.

Q Did he tell you he had these sweaters and wanted to give them to you and you could have them?

A Yes.

Q He did in fact go willingly with you; you never got a search war ant to get the sweaters, did you?

A No.

Q Did you ever tell him at what time the truck was purportedly brought to Brooklyn on the evening of November 26th?

A I cannot say that.

Jules-cross

Q Do you know of anybody who ever told him about that, that that truck was supposedly left off on Washington Avenue or whatever?

A They could have, but I don't recall.

Q Does anything in your record reflect that? Does anything in your record reflect who told him?

A No.

Q Except for those two sweaters that were given to you by Mr. Messina and the other three sweaters which he said he had given to friends of his, did he ever tell you he was in possession of any other sweaters?

A No.

Q Isn't it a fact that he told you in response to your questions that he did not have anything to do with the Hijacking?

A Yes.

MS. SELTZER: No further questions.

MR. LEVIN-EPSTEIN: No redirect, your Honor.

THE COURT: Anything further?

Does the Government rest?

MR. LEVIN-EPSTEIN: Yes.

THE COURT: Any rebuttal by the defendant?

MS. SELTZER: No.

THE COURT: Does the defendant rest?

3

Charge of the Court

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THE COURT: I am going to tell you what the law is, ladies and gentlemen. I want you to follow my instructions. You will decide the facts. I have no view of the guilt or innocence of this defendant and nothing that I have said or done or nothing that the attorneys have said or done should be used by you in inferring guilt or innocence. You will decide that on the basis of the evidence.

The fact that the prosecution is brought in the name of the United States is of no significance. Every party in this court is entitled to the same consideration. Nobody is entitled to any sympathy or favor. The indictment is merely a way of bringing a charge into court. It is not entitled to any weight in your deliberations. It is not evidence.

This defendant has pleaded not guilty and that means that the Government has the burden of proving guilt beyond a reasonable doubt, with respect to each element of each of the two offenses charged. This burden never shifts throughout the trial. A defendant does not have to prove his innocence. He need not submit any evidence. A defendant need not take the witness stand, and if he chooses not to testify, you must draw no inference against him

9

Charge

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1 because he so chooses.

2
3 And the matter should not be considered by
4 you. That is because a defendant is presumed to
5 be innocent. That presumption of innocence remains
6 throughout the trial and into your deliberations.

7 A reasonable doubt means a doubt sufficient
8 to cause a prudent person to hesitate to act in
9 the most important affairs of his or her life.
10 Reasonable doubt may result from the evidence pro-
11 duced or from failure to produce evidence. Finding
12 a person to be guilty of a felony is a serious event,
13 and you should consider that in determining whether
14 or not the Government has proven him guilty beyond
15 a reasonable doubt.

16 Nevertheless, if at the end of your deliberations
17 you are convinced beyond a reasonable doubt that a
18 defendant is guilty of a crime as charged, then you
19 should find him guilty of that crime. There are
20 two counts charged here. And you should consider
21 each count separately.

22 In essence, you are trying two separate
23 cases. In both counts or charges, it is necessary
24 as I will explain to you, for the Government to
25 establish that the defendant acted wilfully and

COURT'S CHARGE

212a

10

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1
2 knowingly before he can be found guilty.

3 And act is willful and knowing if it is done
4 intentionally, deliberately and voluntarily, with the
5 specific intent to accomplish something the law
6 forbids. That is to say, with a bad purpose, Here
7 the bad purpose being, in the case of the first
8 count, to hijack a truck, take possession of it,
9 illegally; and in the second count, to possess illegal
10 merchandise, as I will explain in detail to you in a
11 moment.

12 An act is not knowing if it is committed
13 because of mistake, carelessness, negligence,
14 stupidity or some other non-criminal reason. And
15 the state of mind of the defendant will have to be
16 inferred from the circumstances as revealed by the
17 evidence.

18 Now, Count 1 reads as follows:

19 "On or about the 25th day of November, 1973,
20 within the Eastern District of New York, the
21 defendant Charles Gossia wilfully and knowingly,
22 with intent to convert to his own use, did steal,
23 take and carry away from Lance Air Freight, Cargo
24 Building 80, John F. Kennedy Airport, approximately
25 14 cartons of Italian turtle-neck pullover shirts,

11

Charge

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1 having a value of approximately \$45,000, which
2 goods were moving as, and were part of and constituted
3 a foreign shipment of freight, from Milan, Italy
4 to New York City, State of New York."
5

6 That count charges a violation of one of
7 the Federal statutes, which reads in relevant part
8 as follows:

9 "Whoever steals or unlawfully takes or carries
10 away or by fraud or deception obtains, from any
11 air terminal, airport, aircraft terminal or air
12 navigation facility, with intent to convert to his
13 own use any goods or chattels, moving as or which
14 are a part of, or which constitute an interstate
15 or foreign shipment of freight, express or other
16 property, is guilty of a crime."

17 If you analyze the charge in the statute, you
18 will see that the Government has to prove six
19 elements beyond a reasonable doubt:

20 First, that the cartons were taken from an
21 air cargo facility, in this case, Lance Air Freight
22 Cargo Building 30, at John F. Kennedy Airport,
23 which you could find is within that definition an
24 air cargo facility.

25 Second, that the cartons were moving as a

12

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foreign shipment of freight. In this case from Milano, Italy to New York City. They continue to move in foreign commerce until they are actually delivered to the ultimate consignee.

Third, that the cartons were worth more than a hundred dollars, and you have testimony on that. It does not have to be exactly as charged, as long as it is over a hundred dollars.

Fourth, that the cartons were stolen by the defendant. Now, stolen means acquired or possessed as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property that belongs to another, without or beyond the permission given by that other, and with the intent to deprive the owner of the benefit of ownership, and you can find that taking a truckload of merchandise without consent of the owner or consignee constitutes stealing.

Fifth, that the defendant acted unlawfully and with the intent to convert the goods in question to his own use. Unlawfully means contrary to law. So to do an act unlawfully means to do willfully something which is contrary to law. A person has an intent to convert to his own use when he has the

13

Charge

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1 intent to apply or appropriate it or to sell it
2 or to possess it, for the benefit of some other
3 person than the true owner. So an aspect of your
4 duty in this case is to determine whether the defen-
5 dant intended to convert this cargo to his own use,
6 and since intention is a state of mind, you cannot
7 look in another's mind, you must attempt to determine
8 that from the evidence in the case.
9

10 And sixth, that the defendant acted knowingly
11 and wilfully.

12 I have told you about knowingly and wilfully
13 a few minutes ago.

14 Now, the defendant's position is that he was
15 not the person who was there. He was some other
16 place. The Government's position is that he was
17 the person and that is really, more or less that
18 that count comes down to, who is it that arranged
19 for that towing.

20 You have to determine all of these elements.
21 That seems to me the critical issue, was it the
22 defendant who was there at the time and arranged
23 for the towing and was or was not at Brooklyn when
24 the truck was delivered.

25 Count 2 reads as follows:

14

Charge

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"On or about the 25th day of November, 1973, within the Eastern District of New York, the defendant Charles Messina did wilfully and unlawfully receive and have in his possession approximately 44 cartons of Italian turtleneck pullover shirts having a value of approximately \$45,000, which goods had been stolen from Lance Air Freight, Cargo Building 80, John F. Kennedy Airport, while moving as a part of and constituting a foreign shipment of freight, from Milan, Italy, to New York City, State of New York, the defendant Charles Messina knowing the same to have been stolen."

That's the so-called possession count, and it charges a violation of a different statute, which reads as follows:

"Whoever buys or receives or has in his possession any goods or chattels stolen from foreign commerce, knowing the same to have been stolen, is guilty of a crime."

In this case, he is not charged with stealing the cartons. He is charged with having knowing possession. From goods stolen from foreign commerce, and here, too, you have to find beyond a reasonable doubt six elements:

15

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1 First, that the cartons were in fact stolen.
2
3 There does not seem to be very much question about
4 that, but you have to find that beyond a reasonable
5 doubt.

6 Second, that the value of the cartons exceeded
7 a hundred dollars. There does not seem to be much
8 question about that but you have to find it.

9 Third, that the cartons were taken from an
10 air cargo facility. Again, there does not seem to
11 be much doubt about that but you have to find it.

12 Fifth, that the defendant had in his possession
13 such stolen cartons and that is strenuously contested.
14 The defendant says: It wasn't me there at all.
15 The Government says: We have shown beyond a reason-
16 able doubt that it was you that had possession.

17 Now, that is the critical element really in
18 the case. Now, what is possession? Well, the
19 Government can prove either actual possession or
20 constructive possession.

21 A person who knowingly has direct physical
22 control over a thing at a given time is then in
23 actual possession of it. This is true even if
24 physical control is only momentarily. If he just
25 gets into the truck and helps move it around, he

16

Charge

1 is in possession of what is in that truck. Even
2 though he is not in actual possession, if he has
3 the power and intention to exercise dominion or
4 control, directly or indirectly through another
5 person, he is then in constructive possession.
6

7 That possession may be single or joint. If
8 two or more persons share actual or constructive
9 possession, then it is joint and each person is in
10 possession.
11

12 You can have a person driving a truck with
13 cartons, helping to store them, to load them, to
14 unload them, towing the truck, directing the driver
15 and all of those people are in possession of that
16 truck. So if you find beyond a reasonable doubt
17 from the evidence in the case that the defendant
18 either alone or jointly with others had actual or
19 constructive possession of the goods described in
20 the indictment, then you may find that the goods
21 were in the possession of the defendant, this
22 defendant, within the meaning of the word possession
23 as I have used it.

24 Sixth, that the defendnat must have known
25 that the goods were embezzled or stolen at the time
he had them in his possession. The mere fact that

17

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1 they were stolen does not make him guilty, if he
2 is unaware of the fact that they were stolen. If
3 you find that the defendant knew the goods were stolen,
4 there is enough to find him guilty, even if he does
5 not know all the details of the theft.

6
7 If you find that the defendant possessed
8 goods and you find that they were recently stolen
9 then such possession of recently stolen goods
10 may be considered by you with other circumstances
11 to decide whether a defendant had the requisite
12 knowledge of their being stolen from interstate
13 commerce, unless the evidence satisfactorily
14 explains their possession.

15 He does not have to know that they were stolen
16 from interstate commerce. He must know that they
17 were stolen and they must in fact be in interstate
18 commerce.

19 A difficult aspect of your duty is to determine
20 the credibility of the witnesses that you have heard
21 in this case. In weighing the testimony, you may
22 consider the relationship of the witness to the
23 Government or to the defendant. His or her bias
24 or interest in the outcome of the case. The manner
25 while testifying, the candor and intelligence as you

COURT'S CHARGE

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observed it; the extent to which there has been corroboration or contradiction by other evidence.

If you believe that a witness has wilfully and falsely sworn to you, with respect to a material element of the case, you may disregard his testimony in whole or in part. But a witness may have lied or may have been mistaken with respect to part of his testimony and been accurate with respect to other parts. The question of credibility of experts is to be determined by you in much the same way.

You are not to give any greater weight or credibility to the testimony of a witness who testified in this case solely because of the fact that he is an agent of the Government. His testimony is to be evaluated just as the testimony of all other witnesses are evaluated. The mere number of witnesses or documents has no necessary relationship to the quality of proof, which you will decide.

Your recollection governs. If you want anything read back to you, send in a specific note and I will try to find it for you, but try not to ask to have the whole record reread because we do not want to be here for another three days. Try

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to be very specific, if you actually need it.

If you want any of the exhibits sent in, why, we can do that. It is much easier to send in exhibits.

You are entitled to your own opinions but you should listen carefully to each other. While you should not hesitate to change your mind, if you are convinced that another person is correct, you should make up your mind yourself. The decision has to be unanimous. All twelve of you must agree.

Your oath sums up your duty and that is, "Without fear or favor to any person, you will well and truly try the issues before these parties, according to the evidence given to you in court and the laws of the United States.

Now, I am going to excuse the three alternates. Thank you very much. Report downstairs. Do not discuss this case with each other or anybody else until the verdict is in.

Is that clear? All right. You are discharged.

Now, the attorneys will come to the sidebar in case I have misspoken or omitted to say anything.

(Alternates excused now.)

(The following occurred at side bar.)

COURT'S CHARGE

20

Charge

602

1 THE COURT: Yes?

2 MISS SELTZER: I have no objections.

3 MR. LEVIN-EPSTEIN: None at all, your Honor.

4 (In open court.)

5 THE COURT: All right. Swear the marshal,
6 please.

7 (One male marshal duly sworn by the Clerk
8 of the Court.)

9 THE COURT: Give the Forelady some paper
10 and pencils, please.

11 Ladies and gentlemen, retire and consider
12 your verdict.

13 Call the next case.

14 (The following occurred in the absence of the
15 jury at 3:30 p.m.)

16 THE COURT: All right.

17 Make your motions at the end of the plaintiff's
18 case and your case.

19 MISS SELTZER: Your Honor, at this time I
20 would under Rule 29 of the Federal Rules of Criminal
21 Procedure first at the close of the Government's
22 case for an order of dismissal on the grounds that
23 the Government failed to make out a prima facie case.

24 THE COURT: Denied.
25

COURT'S CHARGE

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21

Charge

MISS SELTZER: And after all the evidence,
I will make the similar motion.

THE COURT: Denied.

All right, get the exhibits laid out on that
side table before you leave.

MR. LEVIN-EPSTEIN: Very well, your Honor.

(Recess taken.)

(Jury out at 3:50 p.m.)

THE COURT: The jury has requested a copy of
the indictment by note marked Court Exhibit 5.

Is there any objection?

MISS SELTZER: No, your Honor.

THE COURT: All right.

The Clerk will mark a copy of the exhibit,
Court -- of the indictment Court Exhibit 6, which has
been examined by both counsel and in the absence of
objection, Court Exhibit 6 is given to the Clerk of
the Court with the instruction to give it to the
marshal for handing in to the jury.

MR. LEVIN-EPSTEIN: I've taken the liberty
of --

THE COURT: One is enough.

MR. LEVIN-EPSTEIN: Okay.

(Recess taken.)

